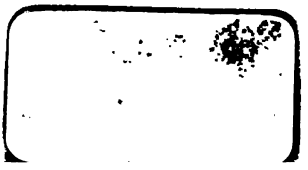

DIGESTED INDEX

TO THE

TERM REPORTS:

CONTAINING

ALL THE POINTS OF LAW

DETERMINED IN THE

Court of King's Bench,

FROM MICHAELMAS TERM, 1785, *TO EASTER TERM*, 1811.

AND IN THE

Court of Common Pleas,

FROM EASTER TERM, 1788, *TO EASTER TERM*, 1810.

THE FOURTH EDITION, CORRECTED,
WITH CONSIDERABLE ADDITIONS.

By T. E. TOMLINS,
OF THE INNER TEMPLE, ESQ. BARRISTER AT LAW.

LONDON:
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1812.

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ADVERTISEMENT.

THE DIGESTED INDEX to the TERM REPORTS, having been found to answer the purposes for which it was compiled, the Editor has continued the Work; as nearly to the present time, as the period required for printing the Volume, would permit.

The Practice of the Courts, and the progress of several interesting and important Cases, are subjected to the view of the Lawyer and the Student, in a way, which, it is hoped, will not only relieve the labour of reference, but may, in some measure, assist in the advancement of knowledge. Such at least ought certainly to be the case, if the utility of the Digest is increased in due proportion to the enlargement of its size.

To render the Volume portable, and to prevent any unnecessary addition to its bulk, the Cases are indexed under the names of the Plaintiffs only in general: but in three instances they are also indexed under the names of the Defendants, *viz.* 1st, Such as have been decided in more Courts than one, in consequence of Writs of Error, or Appeals; 2dly, Ejectment Cases; and 3dly, Sessions and Settlement Cases; and all other Cases where *the King* is nominal Plaintiff.

Hilary Term, 1812.

JUDGES, &c.

DURING THE PERIOD INCLUDED IN THIS DIGEST.

IN THE COURT OF KING'S BENCH.

CHIEF JUSTICES.

THE RIGHT HON. WILLIAM EARL OF MANSFIELD:
His Lordship was not able to attend the Court after the first Day of *Michaelmas* Term, 1786, and resigned his Office on *June* 4, 1788, having held it nearly 32 Years.—He was succeeded by
THE RIGHT HON. LLOYD LORD KENYON,
Appointed *June* 9th, and took his Seat *June* 11th, 1788.
Died in *Hilary* Vacation, 1802, and was succeeded by
THE RIGHT HON. EDWARD LORD ELLENBOROUGH,
Appointed *April* 12th, and took his Seat *May* 7th, 1802.

PUISNE JUDGES.

HON. EDWARD WILLES, ESQ.
Died *January* 14th, 1787.
HON. SIR WILLIAM HENRY ASHHURST, KNT.
Resigned in *Trinity* Term 1799.
HON. FRANCIS BULLER, ESQ. afterwards SIR FRANCIS BULLER;
Created a Baronet *Trinity* Vacation 1789; resigned in *June* 1794, and went to the *Common Pleas*.
HON. SIR NASH GROSE, KNT.
Appointed *February* 1787.
HON. SIR SOULDEN LAURENCE, KNT.
Appointed *June* 1794, from the *Common Pleas* where he had been appointed *Hilary* Vacation preceding.
HON. SIR SIMON LE BLANC, KNT.
Knighted, and took his Seat on the Resignation of SIR W. H. ASHHURST, 6th *June* 1799.
HON. SIR JOHN BAYLEY, KNT.
Appointed *Hilary* Vacation 1808, on the Resignation of SIR SOULDEN LAURENCE, who returned to the *Common Pleas*.

IN THE COURT OF COMMON PLEAS.

CHIEF JUSTICES.

THE RIGHT HON. ALEXANDER LORD LOUGHBOROUGH,
Appointed LORD CHANCELLOR *Hilary* Term 1793; and succeeded in the same Term, as Chief Justice, by
THE RIGHT HON. SIR JAMES EYRE, KNT.
Died in *Trinity* Vacation 1799.—Succeeded by
THE RIGHT HON. JOHN LORD ELDON, who was appointed in the same Vacation; under the Authority of 39 G. 3. c. 113.
Appointed LORD CHANCELLOR *Hilary* Vacation 1801, but presided as Chief Justice till *Easter* Vacation 1801, when he was succeeded by
THE RIGHT HON. RICHARD PEPPER LORD ALVANLEY,
Appointed *Easter* Vacation 1801; died *Hilary* Vacation 1804—Succeeded by
SIR JAMES MANSFIELD, KNIGHT.
Appointed *Easter* Term, 1804.

PUISNE JUDGES,

IN THE COURT OF COMMON PLEAS.

HON. SIR HENRY GOULD, KNT. Died *Hilary* Vacation 1794.
HON. JOHN HEATH, ESQ.
HON. SIR JOHN WILSON, KNT. Died in *Trinity* Vacation 1793.
HON. SIR GILES ROOK, KNT. Appointed *Michaelmas* Term 1793.
Died *Hilary* Vacation 1808.
HON. SIR SOULDEN LAURENCE, KNT. Appointed *Easter* Term 1794.
Removed to the Court of *K. B.* in *June* 1794.
Returned to *C. P.* on the death of SIR G. ROOK.
HON. SIR FRANCIS BULLER, BART. Came from the *K. B.* in *June* 1794.
Died in *Easter* Vacation 1800.
HON. SIR ALAN CHAMBRE, KNT. Appointed *Easter* Vacation 1800.

ATTORNIES-GENERAL.

RICHARD PEPPER ARDEN, ESQ.
Promoted to be Master of the Rolls, and Knighted *Trinity* Vacation 1788.
SIR ARCHIBALD MACDONALD, KNT.
Appointed *Trinity* Vacation 1788; promoted to the Office of Chief Baron of the *Exchequer*, *Hilary* Term 1793.
SIR JOHN SCOTT, KNT.
Appointed *Hilary* Term 1793; promoted to the Chief Justiceship of *C. P.*, *Trinity* Vacation 1799; and created Baron *Eldon*.
SIR JOHN MITFORD, KNT.
Appointed *Trinity* Vacation 1799.
Resigned *Hilary* Vacation 1801; and chosen Speaker of the House of Commons.
SIR EDWARD LAW, KNT.
Appointed *Hilary* Vacation 1801; promoted to the Chief Justiceship of K. B. *Hilary* Vacation 1802; and created Baron Ellenborough.
THE HON. SPENCER PERCEVAL, Appointed *Hilary* Vacation 1802.
SIR ARTHUR PIGGOTT, KNT. Appointed *Hilary* Term 1806.
SIR VICARY GIBBS, KNT. Appointed *Easter* Term 1807.

SOLICITORS-GENERAL.

ARCHIBALD MACDONALD, ESQ.
SIR JOHN SCOTT, KNT.
Appointed *Trinity* Vacation 1788.
SIR JOHN MITFORD, KNT.
Appointed *Hilary* Term 1793.
} Promoted to be Attornies-General, *See above.*

SIR WILLIAM GRANT, KNT. Appointed *Trinity* Vacation 1799.
Resigned *Hilary* Vacation 1801. Appointed Master of the Rolls, *Easter* Vacation 1801.
THE HON. SPENCER PERCEVAL.
Appointed *Hilary* Vacation 1801. Promoted to be Attorney-General.
THOMAS MANNERS SUTTON, ESQ. Appointed *Hilary* Vacation 1802.
Promoted to the Office of a Baron of the Exchequer *Hilary* Term 1805.
SIR VICARY GIBBS, KNT. Appointed *Hilary* Term 1805.
Promoted to be Attorney-General.
SIR SAMUEL ROMILLY, KNT. Appointed *Hilary* Term 1806.
SIR THOMAS PLUMER, KNT. Appointed *Easter* Term 1807.

SERJEANTS.

Easter Term 1786.

GEORGE BOND, Esq. Motto—*Hæreditas à Legibus.*

Michaelmas Term 1786.

JOHN WILSON, Esq. on his being made one of the Justices of *C. P.*
Secundis Laboribus.

Hilary Term 1787.

SIR ALEX. THOMPSON, Knt. on his being appointed one of the Barons of the *Exchequer.*
SIMON LE BLANC, Esq.
SOULDEN LAURENCE, Esq.
Reverentia Legum.

Easter Term 1787.

WILLIAM COCKELL, Esq.—*Stat Lege Corona.*

Michaelmas Term 1787.

C. RUNNINGTON, Esq.
S. MARSHALL, Esq.
J. WATSON, Esq. } *Paribus se Legibus.*

Trinity Term 1788.

LLOYD Lord KENYON, on his being appointed Chief Justice of *K. B*
RALPH CLAYTON, Esq.
Quid Leges sine Moribus?

Michaelmas Term 1789.

J. W. ROSE, Esq. chosen Recorder of *London.—Vitium Lege Regi*

Trinity Term 1794.

S. HEYWOOD, Esq.
J. WILLIAMS, Esq. } *Legum servi ut liberi.*

Hilary Term 1796.

A. PALMER, Esq.—*Evaganti Frœna Licentiæ.*

Easter Term 1796.

S. SHEPHERD, Esq.—*Legibus emendes.*

Easter Term 1798.

B. J. SELLON, Esq.—*Respice quid moneant Leges.*

Hilary Term 1799.

J. VAUGHAN, Esq.—*Paribus se Legibus ambæ.*

Trinity Term 1799.

J. LENS, Esq.
J. BAYLEY, Esq. } *Libertas sub rege pio.*

SERJEANTS.

Trinity Vacation 1799.

SIR J. SCOTT, created Baron *Eldon*, on his being appointed C. J. of *C. P.*
Rege incolumi mens omnibus una.

SIR ALAN CHAMBRE, on being appointed Baron of the *Exchequer.*
Majorum instituta tueri.

Hilary Term 1800.

W. D. BEST, Esq.—*Libertas in legibus.*

Trinity Term 1800.

ROBERT GRAHAM, Esq. on being appointed a Baron of the *Exchequer.*
ARTHUR ONSLOW, Esq.
Et placitum læti componite fœdus.

Hilary Term 1801.

W. M. PRAED, Esq.—*Fœderis æquas dicamus leges.*

Hilary Vacation 1802.

SIR E. LAW, created Baron Ellenborough on being appointed C. J. of England.
Positis mitescunt secula bellis.

Easter Term 1804.

SIR J. MANSFIELD, Knt. on being appointed Ch. J. of *C. P.*
Serus in Cœlum redeas.
SIR T. M. SUTTON, Knt. on being appointed a Baron of the *Exchequer.*
Hic ames dici pater atque princeps.

Easter Term 1807.

SIR GEORGE WOOD, Knt. on being appointed a Baron of the *Exchequer.*
Moribus ornes, legibus emendes.

Easter Term 1808.

WILLIAM MANLEY, Esq.
ALBERT PELL, Esq.
WILLIAM ROUGH, Esq.
} *Pro Rege et Lege.*

Easter Term 1809.

ROBERT HENRY PECKWELL, Esq.
WILLIAM FREERE, Esq.
} *Traditum ab antiquis servare.*

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OF

TITLES AND REFERENCES.

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DIGESTED INDEX

TO THE

TERM REPORTS, &c.

ABATEMENT.

I. *Action. What shall abate it.*

1. AN action does not abate by the plaintiff's becoming a bankrupt; and where he became such between interlocutory and final judgment, and sued out execution *in his own name*, the Court refused to set aside the proceedings. *Waugh* v. *Austin.* 3 T. R. 437
2. The death of the defendant between the commission-day and day of trial is not a ground for setting aside a verdict for the plaintiff. *Jacobs* v. *Miniconi,* 7 T. R. 31
3. If a defendant die on the night before the trial of a cause at the sittings in term, a verdict obtained in such cause, and the judgment entered up thereon, will be set aside upon application to the court. *Taylor* v. *Harris.* 3 B. & P. 549.

II. *What may or may not or must be pleaded in abatement.*

1. An action of trespass for an injury done to the property of the wife *dum sola,* should be brought by the husband and wife: but if such action be brought by the wife alone, the defendant must plead the coverture in *abatement,* and not in *bar.* *Milner* v. *Milnes.* 3 T. R. 627
2. If the plaintiff take husband after suing out the writ, and before the declaration, the defendant cannot give the coverture in evidence under the general issue, but must plead it in abatement if he wish to take advantage of it. *Morgan* v. *Painter.* 6 T. R. 265.

See *Baron and Feme.* I. II.

3. Defendant was baptized *Richard James,* and was called in the declaration *James Richard;* this is a misnomer, and may be pleaded in abatement. *Jones* v. *Macquillin.* 5 T. R. 195
4. Where defendant had been sued as the Right Honourable *Hamilton Flemyng* Earl of *Wigtown,* having privilege of peerage, and had judgment against him, and in debt on that judgment he was called *Hamilton Flemyng,* Esq. commonly called Earl of *Wigtown;* on *nul tiel record* pleaded, held to be a failure of record. *Blackmore* v. *Flemyng.* 7 T. R. 447, *n.*
5. Plaintiffs were incorporated by the name of "the mayor and burgesses of the borough of *Stafford in the county of Stafford,*" and sued by the name of "the *Mayor* and *Burgesses* of the borough of *Stafford,*" this is in abatement and not in bar. *Stafford Corp.* v. *Bolton.* 1 B. & P. 44
6. A misnomer may be pleaded in abatement where the plaintiff misnames himself. 1 B. & P. 44
7. If the cause of action arise *ex contractu,* the plaintiff must sue all the contracting parties; if *ex delicto,* he may sue all or any one. And the same rule applies, where a *tort* is committed by a servant of the defendant sued. Therefore to an action on the case against

several partners for negligence in their servant, whereby the plaintiff's goods were lost, it cannot be pleaded in abatement that there are other partners not named. *Mitchell* v. *Tarbutt*. 5 T. R. 65.

8. If one of two-part owners of a chattel sue alone for a tort, and the defendant do not plead in abatement, the other part-owner may afterwards sue alone, and the defendant cannot plead in abatement to such action. *Sedgworth* v. *Overend*. 7 T. R. 279

9. To an action on the case in the form of tort against one of several joint owners of a ship, for not safely conveying goods which had been delivered to him by the plaintiff for that purpose, the defendant may plead in abatement that the goods were delivered to him and his partners jointly, and that his partners are not sued. *Powell* v. *Layton*. 2 N. R. 365

10. To debt on the stat. 9 *An.* c. 14. to recover back money won at play, the defendant may plead in abatement, that the money was due from others as well as from himself. *Bristow* v. *James*. 7 T. R. 257

11. To an action against a carrier in case on the custom of the realm, for not safely carrying goods, *&c.* the defendant may plead in abatement, that his partners ought also to have been sued. *Buddle* v. *Wilson*. 6 T. R. 269

12. No addition having been given to the defendant, either in the recital of the writ, or in the subsequent part of the declaration, he pleaded the statute or additions, 1 *H.* 5. in abatement, and prayed judgment of the declaration. The court held the plea a nullity, and gave leave to the plaintiff to sign judgment. *Gray* v. *Sidneff*. 3 B. & P. 395

13. As by the practice of the court of K. B. they will not grant oyer of an original writ, and yet a plea in abatement for want of an addition to the defendant in such writ is bad without oyer; the effect is to prevent such a plea from being pleaded, and therefore if pleaded the court will quash it. *Deshons* v. *Head*. 7 E. R. 383

III. *Mode of Pleading.*

1. A plea of misnomer in abatement must conclude with praying *judgment* of the writ: praying *that the same may be quashed* was held ill on special demurrer. *Hixon* v. *Binns*. 3 T. R. 185

2. A plea in abatement of misnomer of the defendant, beginning, "*and the said Richard* sued by the name of *Robert*," is bad. *Roberts* v. *Moon*. 5 T. R. 487

3. The defendant in a plea in abatement of misnomer must give his surname as well as his true christian name, although his true surname be used in the declaration. *Haworth* v. *Spraggs*. 8 T. R. 515

4. One indicted for a misdemeanor, may plead in abatement a misnomer of his surname, *Shakepeare* for *Shakespeare*, which shall not be taken for *idem sonans*; and the plea concluding with praying judgment of the said indictment and that he may not be compelled to answer the same, is good. *R.* v. *Shakespeare*. 10 E. R. 83

5. A plea in abatement is bad if it do not give a better writ, but tend to shew that the plaintiff hath no action at all. *Evans q. t.* v. *Stevens*. 4 T. R. 224

6. A plea in abatement to the jurisdiction of the court, beginning, "*defendit vim & injuriam quando*," was held good by the court of K. B. *Wilkes* v. *Williams*. 8 T. R. 631

7. On a writ in debt for 1066*l.* plaintiff declared for 1000*l.* borrowed by defendant of the plaintiff; and, in a second count for 66*l.* for interest of a certain other sum of money lent by plaintiff to defendant: defendant pleaded in abatement of the writ, "that the said sum of money in the said writ mentioned, and thereby supposed to be borrowed from the plaintiff," was borrowed by defendant and others, and not by defendant separately: on demurrer, because this plea only answered one of the causes of action, that mentioned in the first count, the court held the plea bad. *Harries* v. *Jamieson*. 5 T. R. 553

8. A writ in debt may be abated in part and stand good for the remainder. *Powell* v. *Fullerton*. 2 B. and P. 420

9. If a plea in abatement contain matter which is in part abatement of the writ only, but concludes with a prayer that the whole writ may be abated, the court may abate so much of the writ as the matter pleaded applies to. 2 B. & P. 422

10. Replication to a plea in abatement, (that the promises were made by *A.* and *B.* jointly with the defendant,) that *A* and *B* were in *Scotland* at the commencement of the suit, *&c.* and

had no property within the jurisdiction of the court, by which they could be summoned, &c. is bad. *Shepherd* v. *Baillie.* 6 T. R. 327

11. If a replication to a plea in abatement of the writ begin, "that the said declaration ought not to be quashed," but conclude properly, it is well enough; for such words may be rejected as surplusage. *Sabine* v. *Johnstone.* 1 B. & P. 60

12. In a plea in abatement that another person ought to have been sued with the defendant, it is not necessary to lay a venue. *Neale* v. *De Garay.* 7 T. R. 243

13. Aid prayer is a dilatory plea, within 4 *Ann.* c. 16. and must therefore be verified by affidavit. *Onslow* v. *Smith.* 2 B. & P. 384

14. Defendant having put in a plea in abatement in time, with an affidavit made before he could have seen the declaration, that *the promises contained in the declaration* were entered into if at all by others as well as himself, plaintiff signed judgment, treating the plea as a nullity: the court on motion set aside the judgment. *Lang* v. *Comber.* 4 E. R. 348

IV. *Time of pleading.*

1. The four days allowed for pleading in abatement are *both inclusive.* *Jennings* v. *Webb,* 1 T. R. 277. *Harbord* v. *Perigal.* 5 T. R. 210

2. But if the last of the four days for pleading in abatement, happen on a *Sunday,* the defendant may file such a plea on the fifth day. *Lee* v. *Carlton.* 3 T. R. 642

3. Ancient demesne must be pleaded in ejectment within the first four days of the term. *Dean d. Wroot* v. *Fenn.* 8 T. R. 474

4. A plea of ancient demesne was permitted to be filed *de bene esse* within the first four days; pending a rule nisi for permission to allow the plea so filed. *Doe. d. Morton* v. *Roe* 10 E. R. 523.

5. A declaration is only well filed from the time of notice, whether it be a declaration in chief, or *de bene esse;* and therefore the defendant has four days after notice, in which to plead in abatement. *Hutchinson* v. *Brown.* 7 T. R. 298

6. The plaintiff may sign judgment if the defendant plead in abatement after the four days, though no rule to plead has been regularly served. *Brandon* v. *Payne.* 1 T. R. 689

7. After declaration filed conditionally in a town-cause until special bail should be put in and perfected, and notice thereof served, defendant has only four days for pleading in abatement: and if he put in special bail on the fourth day, which are excepted to on the 5th, and not justified till the 9th, he is then too late to plead in abatement: and plaintiff having demanded a plea, and none other being pleaded, he is entitled to sign judgment as for want of a plea. *Binns* v. *Morgan.* 11 E. R. 411

8. Every plea in abatement must be pleaded before the rule for pleading is out, and cannot be pleaded after an imparlance, unless the declaration is delivered so late in term that the defendant is not bound to plead to it in that term, or is delivered after term; in both which cases the defendant may within the four last days, inclusive, of the subsequent term, plead any plea in abatement as of the precedent term, whether a rule be given or not, and *Sunday* is one. 1 T. R. 278

9. A plea in abatement is bad after a general imparlance. *Evans q. t.* v. *Stevens.* 4 T. R. 278
And may be taken advantage of on a general demurrer. *Buddle* v. *Wilson.* 6 T. R. 369

10. If the tenant in a writ of right pray aid after a general imparlance, it is a good cause of demurrer, and the court will give judgment thereupon, that the tenant answer alone. *Onslow* v. *Smith* 2 B. & P. 384

11. When a declaration is delivered before the essoign-day of a term, with a rule to plead in the first four days of that term, the defendant cannot plead within that time in abatement, without a special imparlance. *Doughty* v. *Lascelles* 4 T. R. 520

12. There cannot be a plea in abatement intitled as of the term subsequent to that in which the declaration is delivered without a special imparlance. *Blackmore* v. *Flemyng.* 7 T. R. 447, *n.*

13. In a country cause, if the defendant put in special bail in time, he may plead in abatement, though the bail be not perfected till after the four days, if they be ultimately perfected within the time allowed by the practice of the court. *Dimsdale* v. *Nielson.* 2 E. R. 406

V. *Judgment on a plea in abatement.*

1. To a plea in abatement of misnomer of plaintiff, replication that the plaintiff was known as well by the one name as the other: upon demurrer over-ruled, there must be judgment of respondeas ouster, and not quod recuperet. *Bowen* v. *Shapcot.* 1 E. R. 542

2. In abatement the court will give no other than the proper judgment prayed for by the party; but in the case of pleas in bar the court will give that which appears to them to be the proper judgment upon the whole record, whether regularly prayed for or not. *R.* v. *Shakespeare.* 10 E. R. 83

ACTION ON THE CASE.

1. *Case and Trespass, distinction between:*

1. Where the injury is committed by the immediate act complained of, the action must be *trespass*; where the injury is consequential upon that act, *case* is the proper remedy. *Day* v. *Edwards.* 5 T. R. 648. *Savignac* v. *Roome.* 6 T. R. 125, *Leane* v. *Bray.* 3 E. R. 593

2. The true criterion is, whether or not the injury were received by force: if it were, the action must be trespass. It is immaterial whether it were wilful or not. 3 E. R. 599

3. If I put in motion a dangerous thing; as if I let loose a dangerous animal, and mischief ensue, I am answerable in trespass, though the case of *Scott* v. *Shepherd* (that of throwing the squib) goes to the limit of law. 3. E. R. 598

4. For false imprisonment the distinction between case and trespass is this; where the immediate act of imprisonment proceeds from the defendant, the action can only be trespass: but where the act of imprisonment by one person is in consequence of information from another, there an action on the case is the proper remedy. *Morgan* v. *Hughes.* 2 T. R. 232

5. A plaintiff cannot declare in an action on the case, that the defendant so furiously drove his cart, that by his improper conduct it was driven with great force against the plaintiff's carriage, *per quod*, the loss happened; his remedy is trespass *vi & armis*. *Day* v. *Edwards.* 5 T. R. 648

6. *A.* declared in case against *B.* for sinking his boat, and after averring a nonfeasance in *B.* as the cause, stated him to have acted with *great force and violence* in accomplishing the injury; *A.* recovered; and on error brought because the action should have been trespass not case, and because the two actions were mixed, the Court of Exchequer Chamber referred the two concluding expressions to the non-feasance first stated, and held the declaration sufficient to support the judgment. *Turner & al.* v. *Hawkins & al.* in *Cam. Scac.* 1 B. & P. 472

7. An action on the case stating that the defendant's servant *wilfully* drove against the plaintiff's carriage whereby it was damaged, cannot be supported: it should have been trespass. *Savignac* v. *Roome.* 6 T. R. 125 and *Tripe* v. *Potter.* 6 T. R. 128, *n.*

8. Where one accidentally drove his carriage against another's, the remedy is *trespass* and not *case;* the injury being immediate from the act done; though he were no otherwise blameable than by driving on the wrong side of the road in a dark night. *Leame* v. *Bray.* 3 E. R. 593

9. If *A. wilfully* run his vessel against *B.'s*, and damage ensue, *B.* may bring trespass: but if *A.* so *negligently* steer his vessel that it runs foul of *B.'s*, then case is the proper action. *Ogle & al.* v. *Barnes & al.* 8 T. R. 188

10. *Case* and not *trespass* is the proper remedy for an injury done to the plaintiff's carriage by the servant of the defendant *negligently* driving his carriage against it. *Morley* v. *Gainsford.* 2 H. B. 442

11. And if such act be done wilfully by the servant, without the assent of the master, neither trespass, nor it should seem, any other action, will lie against the master. *M'Manus* v. *Crickett.* 1 E. R. 106

12. It is difficult to put a case where the master can be considered as a trespasser for an act of his servant, not done by his command. 2 H. B. 443

13. In an action for negligently driving a cart against the plaintiff's carriage, it may be stated in the declaration as the act of the master, though in fact it be the act of the servant. *Brucker* v. *Fromont.* 6 T. R. 659

II. *Consequential Damages by Neglect*, &c.

1. An action on the case will not lie against a party suing out a writ, for neglecting to countermand it after payment of the debt, by means whereof plaintiff was arrested; at least unless malice be averred. *Scheibel.* v. *Fairbain & al.* 1 B. & P. 388

2. Nor even though the costs were paid as well as the debt. *Page* v. *Wiple.* 3 E. R. 314

3. And if in such a case it were incumbent on the party suing out the writ to countermand the arrest, what is a reasonable time for doing so, is a question of law. 1 B. & P. 388
See *Bills of Exchange* VII. 2, 3, 4, 5.

4. And even where the writ was *sued out* after payment of the debt, the facts of the case precluding any inference of malice, it was held, that an action for maliciously holding to bail would not lie without direct evidence of malice. *Gibson* v. *Chaters.* 2 B. & P. 129

5. An action upon the case will not lie by an individual against the inhabitants of a county for an injury sustained in consequence of a county bridge being out of repair. *Russell* v. *The Men of Devon.* 2 T. R. 667

6. A person injured by an obstruction in a highway against which he violently rode, and was thereby thrown off his horse, cannot maintain an action, if it appear that he was riding with great violence and without ordinary care, and that with due care he might have seen and avoided the obstruction. *Butterfield* v. *Forrester.* 11 E. R. 60

7. An action on the case for not repairing fences, whereby another party is damnified, can only be maintained against the occupier, and not against the owner of the fee, who is not in possession. *Cheatham* v. *Hampson.* 4 T. R. 3 8

8. A count in a declaration stating that the plaintiff, being possessed of some old materials, retained the defendant to perform the carpenter's work on certain buildings of the plaintiff, and to use those old materials, but that the defendant, instead of using those, made use of new ones, thereby increasing the expense, may be supported. *Elsee* v. *Gatward.* 5 T. R. 143

9. No action lies against a steward, manager, or agent, for damage done by the negligence of those employed by him in the service of his principal, but the principal of those actually employed only are liable. *Stone* v. *Cartwright.* 6 T. R. 4 1

10. *A.* having a house by the road side contracted with *B.* to repair it for a stipulated sum; *B.* contracted with *C.* to do the work, and *C.* with *D.* to furnish the materials. The servant of *D.* brought a quantity of lime to the house and placed it in the road, by which the plaintiff's carriage was overturned. Held, that *A.* was answerable in an action on the case for the damage sustained. *Bush & Ux.* v. *Steinman.* 1 B. & P. 405

11. If the owner of a house is bound to repair it, he and not the occupier is liable to an action on the case for an injury sustained by a stranger from the want of repair. *Payne* v. *Rogers.* 2 H. B. 349

12. An action on the case lies against the commissioners of the lottery for not adjudging a prize to the holder of a ticket entitled to receive it. *Schinotti* v. *Bumstead.* 6 T. R. 649

13. An action on the case lies against ministerial officers for a neglect of duty, 6 T. R. 649

14. But in an action against a returning officer for refusing a vote at an election of members to serve in parliament, malice must be proved as well as laid. Semble that charging that the defendant knowing, &c. and *wrongfully* intending to deprive plaintiff, &c. hindered him, from giving his vote, &c. is a sufficient allegation of malice. *Drew* v. *Coulton. Launceston* Sp. assizes, 1778, cor. *Wilson* J. cited. 1 E. R. 563, *n.*

15. An action does not lie against individuals for acts erroneously done by them in a corporate capacity, from which detriment happens to the plaintiff; at least not without proof of malice. *Harman* v. *Tappenden.* 1 E. R. 555

16. A banker in *London* receiving bills from his correspondence in the country, to whom they had been indorsed to present for payment, is not guilty of negligence in giving up such bills to the acceptor upon receiving a check upon a banker for the amount, although it turn out that such check is dishonoured. *Russell* v. *Hankey.* 6 T. R. 12

17. *A.* a *general merchant*, undertakes voluntarily, without any reward, to enter a parcel of goods belonging to *B.* together with a parcel of his own of the same sort, at the custom-house, for

exportation; but makes the entry under a wrong denomination, by means of which both parties are seized. *A.* having taken the *same care* of the goods of *B.* as *of his* own, not having received *any reward*, and not being of a *profession* or *employment which necessarily implied skill in what he had undertaken*, is not liable to an action, for the loss sustained by *B. Shiells & al.* v. *Blackburne.* 1 H. B. 54

18. An action on the case lies against a surgeon for gross ignorance and want of skill in his profession, as well as for negligence and carelessness, to the injury of a patient. *Scare* v. *Prentice,* 8 E. R. 348

19. In an action against three, wherein the plaintiff declared that *they* had the loading of a hogshead of the plaintiff's, for a certain reward to be paid to one of them, and a certain other reward to the other two, and that the *defendants* so negligently conducted themselves in the loading, &c. that the hogshead was damaged: held that the gist of the action was the *tort*, and not the *contract* out of which it arose; and therefore that on a plea of not guilty, the two being acquitted, judgment might be had against the third, who was found guilty. *Govett* v. *Radnidge and others.* 3 E. R. 62

20. In estimating the measure of damages in an action for breach of an engagement to replace stock on a given day, it is not enough to take the value of the stock on that day if it have risen in the mean time, but the highest value as it stood at the time of the trial; there being no offer of the defendant to replace it in the intermediate time while the market was rising. *Shepherd* v. *Johnson.* 2 E. R. 211

III. *Consideration.*

1. *A.* having proposed to sell goods to *B.* gave him a certain time at his request to determine whether he would buy them or not; *B. within the time* determined to buy them, and gave notice thereof to *A*; yet *A.* was not liable in an action for not delivering them: for *B.* not being bound by the original contract, there was no consideration to bind *A.* *Cooke* v. *Oxley.* 3 T. R. 653

2. If *A.* and *B.* agree to exchange horses, and *B.* give a sum of money to *A.* to bind the bargain, *A.* may maintain an action against *B.* for not delivering his horse, without alleging any delivery of, or offer to deliver his own to *B.*; for the payment of earnest money vests the property of the plaintiff's horse in *B.* *Bach.* v. *Owen.* 5 T. R. 409

3. But in such an action *A.* must allege a demand on *B.* for his horse; stating that *B.* did not deliver, *though often requested so to do*, is not sufficient. 5 T. R. 409

4. In an action on the case for not delivering corn at *S.* pursuant to an agreement, whereby the defendant, in consideration that the plaintiff had bought of him a certain quantity at a fixed price, undertook to deliver it to the plaintiff at *S.* within one month from the time of the sale, the plaintiff must aver a readiness to pay the price, or what is equivalent thereto. *Morton* v. *Lamb.* 7 T. R. 125

5. In such a case the delivery of the corn and the payment of the price were concurrent acts to be done at the same time; and each must aver performance, or a readiness to perform his part before he can maintain an action against the other. 7 T. R. 125

6. In an action for the non-delivery of malt, which the defendant had undertaken to deliver on request at a certain price, it is sufficient for the plaintiff in his declaration to aver such request, and that he was ready and willing to receive the malt and to pay for it according to the terms of the sale, but that the defendant refused to deliver it; without averring an actual tender of the price. *Rawson* v. *Johnson,* 1 E. R. 203

7. If *A.* agree to buy of *B.*, and *B.* to sell to *A.*, goods at a certain price, to be delivered between such a day and such a day, and *B.* fail to deliver the goods within the time, it is sufficient for *A.*, in declaring on the contract, to aver, that he was during all the time, and still is, ready and willing to receive and pay for the goods; without making any allegation of an actual tender and refusal. *Waterhouse* v. *Skinner.* 2 B. & P. 447

8. A count in a declaration, stating that the plaintiff retained the defendant, who was a carpenter, to repair a house before a given day; that the defendant accepted the retainer, but did not perform the work within the time, *per quod*

the walls of the plaintiff's house were damaged, cannot be supported; for no duty resulted from his situation as a carpenter, and it was not stated that he was to receive any consideration, or that he entered upon his work. *Elsee* v. *Gatward.* 5 T. R. 143

9. Where a navigation act empowered the company to sue for calls, &c. "by action of debt *or on the case*;" it was ruled that an action on the case in tort lay. *Huddersfield Canal Co.* v. *Buckley.* 7 T. R. 36

IV. *Crim. Con. Seduction, &c.*

1. No action for *crim. con.* can be brought for any act of adultery after a separation between husband and wife. *Weedon* v. *Timbrell.* 5 T. R. 357
2. But where husband and wife entered into a deed with trustees, whereby the husband covenanted with the trustees that they should apply certain annuities to the separate use of the wife in case she should live apart from him, *with the approbation of the trustees;* and he also covenanted, in case of future differences, to permit the wife to live separate from him, if she should *on that account* find it necessary; and the deed also contained a clause, that in case of separation with the approbation of the trustees, certain of the children should live with and be educated by the wife for a certain period, and that she might visit the others at his house, especially when ill, *so as to require the attention of a mother;* held, that such a deed did not preclude the husband from maintaining an action for adultery committed while the wife was *in fact* living apart from him, whether the separation were with or without the approbation of the trustees, the case not being within the principle of Weedon *v.* Timbrell, even allowing that to be law to the extent of the case there decided. *Chambers* v. *Caulfield.* 6 E. R. 344
3. An action on the case for debauching and getting with child the plaintiff's daughter and servant, per quod servitium amisit, is not maintained by evidence that the daughter, though under age, was living in another person's family in the capacity of a housekeeper, and had no intention at the time of the seduction to return to her father's house, though she afterwards did return there while within age, in consequence of the seduction, and was maintained by her father. *Dean* v. *Peel.* 5 E. R. 45
4. No such action is maintainable unless laid with a *per quod servitium amisit*, where it does not appear that the daughter was under age. *Satterthwaite* v. *Duerst.* B. R. E. 25 Geo. 3. 5 E. R. 47 *n.*
5. But though the daughter be of age, yet the action is maintainable if she be living with her father. *Booth* v. *Charlton*, at *Lancaster*, in 1789, cor. *Wilson*, J. 5 E. R. 47
6. Or absent on a visit with his consent, with the intention of returning. *Johnson* v. *M'Adam*, ibid. ibid. And see *Bennett* v. *Allcott.* *Trespass*, I.
7. An action for debauching plaintiff's daughter *per quod servitium amisit*, is an action of trespass, and a count for that purpose may be joined with a count for breaking and entering the house. *Woodward* v. *Walton.* 2 N. R. 476
8. Damages ultra the mere loss of service having been given against the defendant for debauchery, and getting with child the *adopted* daughter and servant of the plaintiff, the court refused to set aside the inquisition. *Irwin* v. *Dearman.* 11 E. R. 23

V. *Deceit.*

1. If the purchaser of a horse, warranted to be of a certain age, discover that he is of a greater age, and offer him to the seller, who refuses to take him back, he may sell the horse to any third person, and *then* maintain an action against the seller on the warrantry. *Buchanan* v. *Parnshaw.* 2 T. R. 745
2. A false affirmation, made by the defendant with intent to defraud the plaintiff, whereby the plaintiff receives damage, is the ground of an action upon the case in the nature of deceit. *Pasley* v. *Freeman.* 3 T. R. 51
3. In such an action it is not necessary that the defendant should be benefited by the deceit, or that he should collude with the person who is. 3 T. R. 51
4. The defendant having had a credit lodged with him by a foreign house in favour of one *W. T.* to a certain amount, upon an express stipulation that *W. T.* should previously lodge in his hands goods to treble the amount; and being applied to by the plaintiffs for information respecting the responsibility of *W. T.* answered that he knew

nothing of *W. T.* himself, but what he had learned from his correspondent; but that *he had a credit lodged with him for so much by a respectable house at* H. *which he held at* W. T.*'s disposal*, (omitting the condition), *and that upon a view of all the circumstances which had come to his* (the defendant's) *knowledge, the plaintiffs might execute* W. T.*'s order with safety; viz.* an order for the sale and delivery of goods on credit. In an action on the case to recover damages incurred by the plaintiffs in consequence of having trusted *W. T.* on this representation; held, that there was a material suppression of the truth, and evidence sufficient for the jury to find fraud, which is the gist of the action; although the defendant had no immediate interest in making the false representation; and though at the time when it was made, he added, *that he gave the advice without prejudice to himself.* *Eyre* v. *Dunsford.*
1 E. R. 318.

5. To an inquiry concerning the credit of another, who was recommended to deal with the plaintiff, a representation by the defendant that the party might safely be credited, and that he spoke this from *his own knowledge*, and not from hearsay, will not sustain an action on the case, for damages on account of a loss sustained by the default of the party, who turned out to be a person of no credit; if it appear that it was made by the defendant bonâ fide, and with a belief of the truth of it; for the foundation of the action is *fraud and deceit* in the defendant, and damage to the plaintiff by means thereof. And taking the assertion of *knowledge* secundum subjectam materiam, viz. the credit of another, it meant no other than a strong belief, founded on what appeared to the defendant to be reasonable and certain grounds. *Haycroft* v. *Creasy.* 2 E. R. 92
6. In an action on the case for giving a false character to a tradesman, whereby he was induced to trust an insolvent person, the court held that fraud was necessary to support the action; but set aside a verdict for the plaintiff on payment of costs, though there were some circumstances in the case from which fraud might be inferred, on a suspicion that the inquiry was made of the defendant with a view to entrap him, and thereby obtain his guarantee for payment of the debt contracted by the insolvent. *Tapp* v. *Lee.*
3 B. & P. 367
7. Where a fraudulent misrepresentation of *A.*'s circumstances is made to *B.* who in consequence thereof sells goods from time to time to *A.* an action lies for the deceit, though *A.* receives goods from *B.* at many different times, and pays money to *B.* from time to time to be applied in general payment for the goods. *Hutchinson* v. *Bell.*
1 W. P. T. 558
8. If *A.* fraudulently represent the circumstances of *B.* to be good, in order to induce *C.* to give him credit, and add, "if he does not pay for the goods I will," an action may, notwithstanding the addition of the promise, be maintained against *A* for the misrepresentation. *Hamar* v. *Alexander.*
2 N. R. 241

VI. *For Malicious Prosecution or other Malicious or Wilful Injuries.*

1. An action upon the case will not lie for a malicious prosecution by a superior against an inferior officer, before a naval court-martial, for an offence cognizable by it. *Johnsone* v. *Sutton, (in error in Exch. Ch.)* 1 T. R. 493: [*affirmed in Dom. Proc. 22 May* 1787. 1 T. R. 784]
2. An action for a malicious prosecution will not lie, if probable cause appear in the proceedings: for malice, and the want of probable cause, are both necessary to support this action.
1 T. R. 493
3. Whether certain facts proved, amount to a probable cause, or not, is a question of law. *Candell* v. *London.*
1 T. R. 520, *n.*
4. It lies on the plaintiff in an action for a malicious prosecution to give evidence of malice in the defendant either express or to be collected from circumstances, shewing plainly the want of probable cause; and the malice is not to be implied from the mere proof of the plaintiff's acquittal for want of the prosecutor's appearing when called. *Purcell* v. *M'Namara.* 9 E. R. 316
5. Action for false imprisonment has been held to lie against a superior officer where the imprisonment at first was legal, but was afterwards aggravated with many circumstances of cruelty, and was continued beyond necessary bounds. *Wall* v. *M'Namara.* 1 T. R. 536

6. So also where a captain of a man of war imprisoned the defendant three days for a supposed breach of duty, without hearing him, and then released him without bringing him to a court-martial.
Swinton v. *Molloy.* 1 T. R. 537 *n.*

7. So also against a governor for maliciously suspending defendant from a civil office.
Sutherland v. *Murray.* 1 T. R. 538 *n.*

8. An action on the case for delaying to bring an officer under arrest to a naval court-martial will not lie; it being a military defence, and the defendant not having been tried for it.
2 T. R. 548, *n.*

9. Action on the case lies for maliciously obtaining or executing a warrant to search a house for smuggled goods, where none such are found.
Cooper & al. v. *Boot (in error)*
1 T. R. 535, *n.*

10. An action on the case will not lie by the bailiff of a liberty against a person for suing out a writ of *capias* with a *non omittas* clause: which writ was executed by the sheriff within a particular liberty, where such bailiff had the execution and return of writs (without a prior writ of latitat having first issued) upon an allegation that such writ of capias was *wrongfully, injuriously,* and *deceitfully* caused to be issued by the defendant to the damage of the bailiff in his office.
Carrett v. *Smallpage & al.*
9 E. R. 330

11. Where a justice of the peace maliciously grants a warrant against another without any information upon a supposed charge of felony, the remedy against the justice is trespass for the false imprisonment, and not case.
Morgan v. *Hughes.* 2 T. R. 225

12. A declaration in an action for a malicious prosecution for felony, must state that the prosecution is at an end; alleging that the plaintiff was discharged from his imprisonment is not sufficient.
2 T. R. 225

13. The word *acquitted* indeed must be taken in its legal sense, namely, by a jury. 2 T. R. 231

14. So if it had been alleged that the plaintiff had been discharged by the grand jury's not finding the bill, that would have shewn a legal end to the prosecution. 2 T. R. 232

15. An action lies for a malicious prosecution, though the plaintiff were acquitted on a defect in the indictment.
Wicks v. *Fentham.* 4 T. R. 247

16. An action will lie for continuing to employ the servant of another after notice, though the employer did not procure the servant to leave his master, or know when he employed him that he was the servant of another.
Blake v. *Lanyon.* 6 T. R. 221

17. An action on the case to recover damages against the lessor of the plaintiff in a vexatious ejectment is not maintainable.
Purton v. *Honnor.* 1 B. & P. 205.

18. If a person place dangerous traps baited with flesh in his own ground, so near to a highway or to the grounds of another that dogs passing along the highway or kept in his neighbours' grounds must be attracted by their instinct into the traps, and in consequence thereof the dogs of another be so attracted and are injured, an action on the case lies.
Townsend v. *Wathen.* 9 E. R. 277

19. Firing at wild-fowl to kill and make profit of them, by one who was at the time in a boat, on a public river, or open creek, where the tide ebbs and flows, so near to an ancient decoy on shore, as to make the birds there take flight, is evidence of a wilful disturbance of, and damage to the decoy, for which an action in the case is maintainable by the owner.
Carrington v. *Taylor.* 11 E. R. 571
See also *Keeble* v. *Hickeringill.*
T. 5 Ann. 11 E. R. 573, 4 *n.*

ADMIRALTY.

I. *Jurisdiction.*

1. If the owner of a ship charge her for repairs done in *England,* by an instrument under seal, stated to be by way of bottomry, upon which she is afterwards seized by admiralty process, and decreed to be sold to satisfy the demand, and no appeal is made from that sentence, but between the seizure and decree, a writ of execution issues against the owner at the suit of another creditor, the sheriff cannot take the vessel under this writ; nor can he maintain trover against the officer in possession by the warrant of the court of Admiralty.
Ladbroke v. *Crickett.* 2 T. R. 649

2. Whether the Admiralty have or have not jurisdiction depends upon the *subject matter*.

Menetone v. *Gibbons*. 3 T. R. 267

4. Therefore they may take cognizance of an hypothecation bond given in the course of a voyage, though it be executed *on land*, and *under seal*.

3 T. R. 267

5. The Admiralty Court has jurisdiction over the question of freight, claimed by a neutral master against the captor, who has taken the goods as prize.

Smart v. *Wolff*. 3 T. R. 323

6. And a monition having issued, after the goods were condemned and decreed to be delivered to the captors, at the suit of such master against the plaintiffs *as owners or agents of the prize goods* to bring into court *the produce remaining in their hands* to answer the freight, the Court of *B. R.* refused a prohibition; though no fidejussory caution had been taken before the goods were delivered to the captor, but *the question of freight had been reserved* by the terms of the decree for future consideration. 3 T. R. 323

7. If the legal property in the goods had been altered by a sale in market overt, whether that would have varied the case. *Qu.?* 3 T. R. 342. 348

8. The fide-jussory caution is only an accumulative remedy, the better to enable that court to pursue the property; but it does not supersede the jurisdiction *in rem*. 3 T. R. 342. 346

9. The Admiralty have no jurisdiction in a case where a vessel is injured in the *Thames, within the body of a county*.

Velthasen v. *Ormsley*. 3 T. R. 315

10. If it appear that the Court of Admiralty is proceeding in a question over which it has no jurisdiction, a court of common law will grant a prohibition, without imposing any terms on the party applying for it. 3 T. R. 315

11. An appointment by the Lords of the Admiralty of a captain in the navy to be second commander on board a king's ship is valid by their general authority to appoint what officers they think proper for the service, although another was appointed to the first command on board the same ship, and notice is only taken of *one* captain in the book of regulation for the navy. And such second captain is entitled to a captain's share of prize under the king's proclamation.

Waterhouse v. *King*. 2 E. R. 507

12. The book of regulations for the navy, submitted by the Lords Commissioners of the Admiralty to the King in council in 1730, and approved by his Majesty by an order of Council, is only directory to the Lords Commissioners. 2 E. R. 507

13. The Vice-Admiralty Courts abroad have no authority, upon the mere petition of a Captain, to decree the sale of a ship reported not to be seaworthy, or repairable so as to convey the cargo to its place of destination but at an expense exceeding the value of the ship when repaired.

Reid v. *Darby*. 10 E. R. 443

14. It seems that the manslaughter of an English subject committed in China, by an alien enemy who had been a prisoner of war, but was then acting as a mariner on board an English merchant ship, cannot be tried in England, under a commission issued in pursuance of statutes 33. *H.* 8. *c.* 23; 43. *G.* 3. c. 113. §6.

R. v. *Depardo*. 1 W. P. T. 26

[N.B. In this case no judgment was ever given and the prisoner was ultimately discharged.]

II. *Prizes.*

1. The Court of Admiralty has exclusive jurisdiction over questions of prize and their consequences. *(obiter dict.)*

3 T. R. 344

2. During a war with the States-General, a squadron of the king's ships having a detachment of the king's troops on board, were sent to attack a settlement belonging to the enemy, and secret instructions were given by his Majesty to the commanders in chief, *that all the booty which should be gained by the joint operation of the army and navy at the attack of the settlement, should be divided into two shares, between the land and sea forces.* The attack was not made, but the squadron, *while the troops were on board*, took as prize a ship and cargo belonging to the enemy, *in an open unfortified bay*, at a distance from the destined object of attack. This ship and cargo being condemned as lawful prize, *the produce was to be distributed according to the provisions of the prize act*, 21 *G.* 3. c. 15. The Court of Common Pleas held that under that act *a legal right was vested* in the officers and crews of the squadron, to their respective shares, on the con-

demnation; and the lords commissioners of appeals from the Admiralty having issued a monition to the prize agent, to bring in the proceeds which were in his hands, a *prohibition* was granted to that court by the Court of C. P. because they considered the monition as *contrary to the legal vested right.*

Home v. *Earl Camden & al.* 1 H. B. 476

3. But this judgment was reversed on a writ of error to the Court of K. B. who refused to grant the prohibition, on the ground that the prize courts and courts of lords commissioners of appeals have the sole and exclusive jurisdiction over the question of prize or no prize, and who are the captors, notwithstanding any of the prize acts; and that if they pronounce a sentence of condemnation, adjudging also who are the captors, the courts of common law cannot examine the justice or propriety of it; even though perhaps they would have put a different construction on the prize acts. And the same courts have power to enforce their decrees.

4 T. R. 382

This judgment of the Court of K. B. was *affirmed in Dom. Proc.* 22 *June*, 1795, 2 H. B. 533: and see 6 *Parl. Cases*, 8vo. 203.

4. It is concluded therefore that no right is *vested*, by any of the prize acts, in the captors of an enemy's ship and cargo in war, before the ultimate adjudication of the courts of prize. And that consequently, the issuing a monition to the prize agents by the court of commissioners of appeals in prize causes, to bring in the proceeds of a ship and cargo which have been sold after a sentence of condemnation as lawful prize, but from which sentence there is an appeal (on a subject distinct from the question, whether prize or not, which is not disputed), is not a ground for a prohibition to that court; for the monition neither interferes with, nor defeats any *vested right.*

2 H. B. 533

5. A Commodore who appoints *a captain under him*, without having authority for that purpose, is not entitled to share as a flag officer in the distribution of prizes under his majesty's proclamation; Nor will the subsequent ratification of such appointment by the Lords of the Admiralty, or the King in Council, entitle him to share as a flag officer in any prizes taken before the date of such ratification. *Donelly* v. *Sir Home Popham.*

1 W. P. T. 1

6. A prize act directs, that where ships, &c. are taken from the enemy and condemned as lawful prize in a Court of Admiralty, and the sentence of condemnation appealed from, "execution of any sentence so appealed from as aforesaid, should not be suspended by reason of such appeal, in case the party or parties appellate should give *sufficient security*, to be approved of by the court in which such sentence should be given, to restore the ship, &c. concerning which such sentence should be pronounced, or the *full value thereof*, to the appellant or appellants, in case the sentence so appealed from should be reversed."—Though a security taken in a Court of Vice-Admiralty, by virtue of this section of the act, is in the form of an *acknowledgment of a debt to the king*, yet not being in a court of record, it is not strictly a *recognizance*, but operates as a *stipulation* by the parties to abide the decision of the court of appeals. Neither is the court of appeals bound by this section to interpret the words "full value" by any *definite measure*. but they have a discretionary power of declaring what is *the full value*, and a power to enforce payment, from the sureties, of what they declare to be the *full value*. *Brymer & al.* v. *Atkins & al.*

1 H. B. 164

The judgment in this case was affirmed by the Court of K. B. on a writ of error. M. 30, *G.* 3.

AFFIDAVIT.

I. *To hold to Bail. See post*, II.)

1. An affidavit to hold to bail must shew how the debt arose.

Cooke v. *Dobree.* 1 H. B. 10

2. Must in general be positive.

Sheldon v. *Baker.* 1 T. R. 83

3. Must state positively that the defendant is indebted to the plaintiff in so much, &c.

Wheeler v. *Copeland.* 5 T. R. 364

4. The cases of assignees, executors, &c. are exceptions to that rule; and they must swear as to *their belief* of the debt.

Sheldon v. *Baker.* 1 T. R. 63

5. If an assignee of a bankrupt, and two others, sue jointly, the former may hold the defendant to bail, on an affi-

davit of the debt, "as appears by the bankrupt's books, and as the deponent believes."

Swaine v. *Crammond.* 4 T. R. 176

6. A co-assignee of a debt arising out of bills of exchange in his own possession may sue in the name of the original creditor; and hold the defendant to bail on his own affidavit; swearing positively as to all the facts required which are within his own knowledge, and to the best of his knowledge and belief, as to such as are within the knowledge of his principal and co-assignee.

Cresswell v. *Lovell & al.* 8 T. R, 418

7. An affidavit to hold to bail made by a third person, need not state a connexion between the deponent and the plaintiff.

Pieters & al. v. *Luyjes.* 1 B. & P. 1

8. In one instance the court held an affidavit, "that the defendant was indebted to the plaintiff in 5000*l.* for money had and received, and for which he had not accounted," to be insufficient. Dict. per *Buller* J. 1 T. R. 717

9. The Court of K. B. held it sufficient to state that the defendant was indebted to the plaintiff in such a sum "for money had and received on account of the plaintiff," without adding, "received *by the defendant.*"

Coppinger v. *Beaton.* 8 T. R. 338

10. An affidavit stating only that the defendant was *indebted* to the plaintiff in *5l.* for goods sold and delivered, not stating *by the plaintiff* to the *defendant*, was held insufficient.

Perkes v. *Severn.* 7 E. R. 194:
Taylor v. *Forbes.* 11 E. R. 315.

11. An affidavit stating only that "the defendant was indebted to the plaintiff for goods sold and delivered to him the defendant," without saying *by the plaintiff*, is insufficient.

Cathrow v. *Hagger.* 8 E. R. 106.

12. An affidavit to hold to bail, stating that the defendant is indebted to the plaintiff in a certain sum, *as appears by the Master's allocatur* is not sufficiently positive.

Powell v. *Portherch.* 2 T. R. 55

13. An affidavit stating the defendant to be indebted "for damages awarded, and for costs and expenses taxed and allowed," is sufficiently certain; for it will be inferred that the award and taxation are such as will support the action. *Jenkins* v. *Law.* 1 B. & P. 365

14. An affidavit to hold to bail stating that the defendant was indebted to the plaintiff so much for interest money, under and by virtue of an agreement, is insufficient.

Brook v. *Trist.* 10 E. R. 358

15 Affidavit to hold to bail, "that the defendant is indebted to the plaintiff in 20*l. according to the bill delivered by the plaintiff to the defendant,*" is insufficient; it must be positive.

Williams v. *Jackson.* 3. T. R. 575

16. An affidavit to hold to bail, "stating a promise made by the defendant executor, &c. to pay a legacy of 100*l.* bequeathed by his testatrix, and confessing assets to the amount of 280*l.* but that the plaintiff, not receiving the said sum, caused several applications to be made to the defendant without effect, therefore that the defendant was indebted," &c. is not sufficiently positive.

Mackenzie v. *Mackenzie.* 1 T. R. 716

17. A bond was given conditioned for the payment of bills of exchange drawn in *England*, on *A.* in the *East Indies*, in case such bills should *be returned to England protested for non-payment.* The *affidavit* to hold the obligor to bail, after stating "that he was indebted to "the deponent the obligee in a certain "sum," stated also the condition of the bond, and "that the said bills "were not paid *to his knowledge or* "*belief in India*, or elsewhere; but that "they were *protested for non-acceptance* "*in India*, and were still unpaid." It was no objection in this affidavit, that it was stated that the bills were unpaid to the *knowledge and belief* of the plaintiff; but it was *bad*, because it introduced a *new term*, not mentioned in the condition of the bond, *viz.* a protest for *non-acceptance.*

Hudson & al. v. *Campbell.* 1 H. B. 245

18. An affidavit stating the defendant to be indebted to the plaintiff as indorsee of a bill of exchange, without alleging the bill to have become due, was held sufficient. *Davison* v. *March.* 1 N. R. 157

19. On an affidavit that the maker and indorser of a promissory note are indebted to the holder, neither can be held to bail: it is also objectionable as being only on one stamp. And it is such an incurable defect that, if either be held to bail, he does not waive it by taking any step in the cause.

Hussey v. *Wilson.* 5 T. R 254

20. An affidavit stating that the defendant "was justly indebted to the

plaintiff in 100*l.* upon and by virtue of a certain bill of exchange drawn by the defendant, and long since due and unpaid," is sufficient, without stating in what character the bill was due to the plaintiff, whether as payee or indorsee.

Bradshaw v. *Saddington.* 7 E. R. 94

21. Stating that "the plaintiff on, &c. gave the defendant notice to quit on, &c. and that the latter held over, &c. by reason of which, and by force of the statute, an action has accrued to the plaintiff to demand of the defendant, &c." double rent, is not sufficient.

Wheeler v. *Copeland.* 5 T. R. 364

22. So stating the circumstances under which the debt accrued, and concluding, "by reason whereof the defendant stands indebted," is insufficient.

Fowler v. *Morton.* 2 B. & P. 48

23. Affidavit "that the defendant was indebted to the plaintiff in 24*l.* for money lent by plaintiff to defendant for the use of another, and for which defendant promised to be accountable, and to repay *or cause to be secured* to the plaintiff," &c. insufficient; it not appearing in the affidavit but that the money had been secured according to the agreement.

Jacks v. *Pemberton.* 5 T. R. 552

24. In an affidavit to hold to bail, the plaintiff deposed, that at the time of the assignment thereinafter mentioned, the defendant was indebted to him on a bill of exchange, and that he afterwards assigned the debt by indenture to *A. B. C.* and *D.* in trust: *A.* then deposed, that, at the time of the affidavit being made, the defendant was indebted to them *A. B. C.* and *D.* as such assignees and trustees as aforesaid. Held that the affidavit was insufficient, because it did not deny that the debt had been satisfied to the plaintiff between the assignment and the time of the affidavit being made.

Mann v. *Sheriff.* 2 B. & P. 355

But in the above case a supplemental affidavit was allowed. 2 B. & P. 355

25. One who became surety for the defendant before his discharge under an insolvent debtor's act, and was afterwards obliged to give a new security of a bond and warrant of attorney, &c. for the old debt, cannot thereupon hold the defendant to bail by an affidavit as for so much *money paid* to his use. *Taylor* v. *Higgins.* 3 E. R. 169

26. An affidavit to hold to bail for stipulated damages for non-performance of an agreement must state a breach of the agreement.

Stinton v. *Hughes.* 6 T. R. 13

27. A party cannot be held to bail for a penalty, but only for the sum secured by the penalty.

Hatfield v. *Lingard.* 6 T. R. 217

28. And therefore an affidavit "that the defendant was indebted to the plaintiff in 1000*l.* under an agreement in writing, whereby the defendant undertook to pay the plaintiff the balance of accounts, &c. *which said balance is still due and unpaid,*" without stating that the balance was 1000*l.* was held to be defective. 6 T. R. 217

29. So an affidavit to hold to bail for a sum certain for the breach of an agreement, must shew that the sum demanded is stipulated damages, and not merely a penalty.

Wildey v. *Thornton.* 2 E. R. 409

30. In an affidavit to hold to bail in trover for a bill of exchange, it should be stated that the bill remains unpaid.

Clarke v. *Cawthorne.* 7 T. R. 321

31. The Court of C. P. held an affidavit that the defendant "was indebted to the plaintiff *in trover*" bad.

Hubbard v. *Pacheco.* 1 H. B. 218

32. Affidavit to hold to bail in trover, stating, "that the plaintiff's cause of action against the defendant was for converting and disposing of divers goods of the plaintiff of the value of 250*l.* which he refused to deliver, though the plaintiff had demanded the same, and that neither the defendant or any person on his behalf had offered to pay to the plaintiff the 250*l.* or the value of the goods," was holden to be insufficient. *Woolley* v. *Thomas.*

33. If a defendant be holden to bail under a judge's order, upon an affidavit disclosing circumstances which shew that the plaintiff has been *damnified* to such an amount, it is sufficient; though it improperly state that the defendant was *indebted* to that amount, and disclose the special circumstances.

Imlay v. *Ellerson.* 2 E. R. 453

34. A defendant having been held to bail on an affidavit of a debt due from three defendants as surviving partners of another deceased, was discharged on filing common bail; the declaration being for a debt due from the three defendants alone. *Spalding* v. *Mure and two others.* 6 T. R. 363

35. If an affidavit to hold to bail state two sums of money to be due from the defendant to two separate plaintiffs, though only one writ be sued out on it, the court will set aside the proceedings on that one writ. *The Dean and Chapter of Exeter* v. *Seagell.* 6 T.R. 688

36. The plaintiff, in an affidavit to hold to bail, must give himself an addition; otherwise the defendant will be discharged on common bail.

Jarrett v. *Dillon.* 1 E. R. 18

37. The addition of "manufacturer" to the deponent's name is sufficient.

Smith v. *Younger.* 3 B. & P. 550

38. A foreigner whose general residence is abroad, and who only landed here for a temporary purpose, viz to make an affidavit to hold the defendant to bail, may properly describe his place of abode to be in his own country, and not at the place where the affidavit was sworn, within the meaning of the rule of court. *Mich.* 15 *Car.* 2.

Bouket v. *Kittoe.* 3 E. R. 154

39. It is an immaterial objection to an affidavit to hold to bail that the initials only of the defendants christian names are inserted.

Howell v. *Coleman.* 2 B. & P. 466 (And see *post*, VI. 3. 9, 10, 11.)

40. An affidavit to hold to bail sworn in *Ireland*, but made for the purpose of being used in England, ought to contain all the essential requisites of such an affidavit made in *England*; amongst others, according to the acts, 37 *G.* 3. *c.* 45. *s.* 91: 38 *G.* 3. *c.* 1. that the defendant had not made a tender of the money in notes of the Bank of *England*.

Nesbett v. *Pym.* 7 T. R. 376, *n.*

41. Where bailable process was sued out previous to passing the said act, 37 *G.* 3. *c.* 45. and renewed four several times without any new affidavit, and the last renewal on which defendant was arrested, was subsequent to passing the act, the Court of *C. P.* held the affidavit sufficient, though not according to the act.

Crooks v. *Houlditch.* 1 B. & P. 276

42. In an affidavit to hold to bail for 1190*l.* 11*s.* 3*d.* it is not enough to negative a tender of the said debt in bank notes; for *non constat* but a tender in bank notes was made of all but the fractional sum, which would be sufficient within the statute.

Jennings v. *Mitchell.* 1 E. R. 17

43. But in an affidavit to hold to bail for 20*l.* *and upwards*, it is sufficient to negative a tender of the *said sum* in bank notes: that having reference to the specific sum sworn to, which was such as might be so tendered.

Maylin v. *Townshend.* 2 E. R. 1

44. But it is not sufficient to negative a tender of *the said sum of* 20*l.* *and upwards:* that having reference to a sum beyond the 20*l.*

Ford v. *Lover.* 3 E. R 110

45. It is sufficient if the affidavit state, that no tender was made *by the defendant*; without saying or by any other on his account.

Wyatt & al. v. *Smee.* 1 B. & P. 344

46. So if it negative a tender in notes "payable on demand," though the words of the act are "*expressed* to be payable on demand."

Fowler v. *Morton.* 2 B. & P. 48

47. In an affidavit made by the plaintiff's agent, (the plaintiff himself being abroad), it is sufficient to negative a tender, "as the agent believes".

Munro v. *Spinks.* 8 T. R. 284

48. But where plaintiff resided in *England*, and the affidavit was made by his clerk, it was held not sufficient to negative a tender "to the knowledge and belief of the clerk."

Cass & al. v. *Levy.* 8 T. R. 520

Elliot v. *Duggan.* 2 E. R. 24

49. An affidavit to hold to bail, however, sworn by a clerk in the chamberlain of *London's* office, as to the existence of the debt, and that no tender of it had been made in bank notes to the best of his knowledge and belief, was held sufficient, in an action by the corporation. *Mayor. &c. of London* v. *Dias,* 1 E. R. 237

50. The Court of Common Pleas have held, that if an affidavit made by the plaintiff's clerk absolutely negative a tender in bank notes, it is bad.

Smith v. Tyson. 2 B. and P. 339

Hammersley v. *Mitchell.* 2 B. & P. 389

51. But the Court of King's Bench, on facts precisely similar, refused to discharge the defendant on a common appearance. *Madox* v. *Abercromby,* K. B. 41 *G.* 3. (cited in *Hammersley* v. *Mitchell.* 2 B. & P. 389.) And again in *Knight* v. *Keyte.* 1 E. R. 416

52. A person employed in London as agent to one residing at a distance in the country, with a power of attorney to collect his debts, may make an af-

fidavit of debt, positively denying any tender in bank notes.

Chatterley v. *Finck.* 2 B. & P. 390

53. An affidavit of debt made by one of three partners, denying any tender in bank notes to himself or to either of his partners to the best of his knowledge and belief is sufficient.

Stacy v. *Federici.* 2 B. & P. 390

54. An affidavit to hold to bail in which a tender in bank notes is negatived by the plaintiff's clerk alone, then resident in London is insufficient, if the plaintiff be also resident in London; though the debt arose upon a bill transaction of which the clerk had the sole management. *Bolt* v. *Miller.* 2 B. & P. 420

55. Affidavit made by *A.* in respect of a debt due to *B.* before his discharge under an insolvent act whereby *B.*'s estate became vested in the clerk of the peace, negativing a tender in bank notes to the knowledge or belief of *A.* held sufficient: the court allowing *A.* and *B.*, by a subsequent affidavit, to shew that *A.* usually transacted *B.*'s business when out of town, and that at the time when the affidavit to hold to bail was made, *B.* was out of town, and that an immediate arrest was necessary, as the defendant was about to sail on a voyage.

Lawson v. *M'Donald.* 2 B. & P. 590

56. In an action by the assignees of a bankrupt, it is not sufficient for the bankrupt to negative the tender.

Smith v. *Barclay.* 3 B. & P. 219

57. In an affidavit by an assignee of a bankrupt it is necessary to negative a tender to the bankrupt before his bankruptcy: negativing a tender to the assignee is not sufficient.

Martin v. *Rance.* 8 T. R. 455

58. An affidavit to hold to bail made by the administrators of a person who died before the passing of the bank act, need not negative a tender in bank notes to their intestate.

Percy v. *Powell.* 3 B. & P. 6

59. *Semb.* That persons suing as administrators need not in any case negative such tender to their intestate.

3 B. & P. 6

60. If a defendant on being informed that a bailable writ has been issued against him voluntarily give a bail-bond, he cannot afterwards object to the insufficiency of the affidavit to hold bail.

Norton v. *Danvers.* 7 T. R. 375

61. An objection cannot be taken advantage of after plea.

Levy v. *Duponte.* 7 T. R. 376 *n.*

62. Nor after notice of executing a writ of inquiry on a judgment by default.

Desborough v. *Coppinger.* 8 T. R 77

63. Nor after perfecting bail above (in C. P.) *Chapman* v. *Snow.* 1 B. & P. 132

64. So in K. B. *Jones* v. *Price.* 1 E. R. 81

65. Nor after merely putting in bail.

D'Argent v. *Vivant.* 1 E. R. 330

66. In both courts the affidavit to hold to bail is to be considered as part of the process to bring the defendant into court; an irregularity in it must be taken advantage of in the first instance; and may be taken advantage of before bail put in, or appearance entered; so such irregularity may be waved by a defendant, and is considered as waved, when he has voluntarily done an act, submitting to such process. 1 E. R. 336

II. *To hold to Bail in Penal Actions.*

1. An affidavit to hold to bail on *the lottery act.* 27 *G.* 3, *c.* 1. should specify the nature of the offence, and aver that the defendant has incurred the forfeiture; but the offence need not be described circumstantially: nor is the plaintiff obliged to swear that the defendant is indebted to him to the amount of the penalty.

Davis v. *Mazzinghi.* 1 T. R. 705

2. It is sufficient if the affidavit, on which the defendant is holden to bail for an offence against the said act, shew the *nature* of the offence, without stating the particular circumstances of it.

Watson v. *Shaw.* 2 T. R. 654

3. It is sufficient if it state that the defendant "insured or caused to be insured," &c. 2 H. B. 17

4. A plaintiff who sues for penalties under the said act must make an affidavit previous to the suing out of the writ, specifying the amount of the penalties sued for. *King q. t.* v. *Horne.* 4 T. R. 349

5. In an action for the penalty of the lottery acts, it is sufficient if the process state the sum to which they amount as the debt, without describing it as arising from penalties, or specifying the offence, provided there be an affidavit for that purpose, and it is also a sufficient compliance with the *stat.* 33 *G.* 3. *c.* 62. *sect.* 38. to state in the process that the plaintiff is "appointed by the commis-

" nioners of his majesty's stamp duties " to prosecute."

King q. t. v. *Pacy.* 2 H. B. 601

6. An affidavit to hold to bail for penalties forfeited by unlawful insurances against the lottery act, 22 *G.* 3. *c.* 47. may include several offences, and need not state that the defendant received any consideration for making the insurances.

Holland q. t. v. *Bothmar.* 4 T. R. 228.

7. Where several persons have separately incurred penalties for printing illegal schemes of the lottery, a separate affidavit must be filed against each of them: and if they be all joined in one affidavit, the irregularity is not waved by their putting in bail; but the court on motion, will stay the proceedings against all of them.

Goodwin q. t. v. *Parry.* 4 T. R. 577

8. If an affidavit to hold the defendant to bail, state an act to have passed in the 27 *G.* 3. which was passed in the 28 *G.* 3. under which a penalty was incurred, it is a fatal objection, even though the title of the act be properly set forth.

Watson v. *Shaw.* 2 T. R. 654

9. Proceedings in a penal action on 25 *Ed.* 3. *st.* 4 *c.* 3. stayed on motion, because no affidavit had been filed, that the offence was committed within the county where the action was brought, or within a year, according to 21 *Jac.* 1. *c.* 4.

White q. t. v. *Boot.* 2 T. R. 274

10. But in a subsequent case the Court of K. B. refused to stay the proceedings in debt on a penal statute *after verdict*, though no such affidavit had been filed.

Leigh q. t. v. *Kent.* 3 T. R. 362

[And see *Balls q. t.* v. *Atwood.* 1 H. B. 546]

III. *Entitling* (and see *post*, VI.)

1. An affidavit to hold to bail in an action for penalties under the lottery act must not be entitled, because there is no cause in court.

King q. t. v. *Cole.* 6 T. R. 640

2. And in such case the Court of K. B. discharged the defendant out of custody. 6 T. R. 640

3. So the Court of C. P. discharged a defendant where the affidavit was entitled *A. B.* plaintiff and *C. D.* defendant. *Hollis* v. *Brandon.* 1 B. & P. 36

4. But in a subsequent case the Court of K. B. refused to discharge a defendant out of custody on the ground that the affidavit on which he had been holden to bail was entitled in the cause.

Clarke v. *Cawthorne.* 7 T. R. 321 (S. P. *Levi* v. *Ross*, and *Gaunt* v. *Marsh*, cited in the note. 7 T. R. 321)

5. Though now it is settled that affidavits of any cause of action, before process sued out to hold defendants to bail, *are not to be entitled* in any cause. *Reg. Gen. K. B. T.* 37 *G.* 3. 7 T. R. 454

6. And this rule is recognised by the Court of C. P.

Green v. *Redshaw.* 1 B. & P. 227

7. Where a submission to an award is made a rule of court under the statute, there being no action, the affidavits on which to apply for an attachment for disobeying the award need not be entitled in any cause, but the affidavits in answer must.

Bevan v. *Bevan.* 3 T. R. 601

8. But in such case neither the affidavits in support of, nor those in answer to, a rule for setting aside the award need be entitled.

Bainbridge v. *Houlton.* 5 E. R. 21

9. If an affidavit on a motion for leave to file a criminal information be entitled, it cannot be read.

R. v. *Robinson*, cited. 6 T. R. 642

10. An affidavit produced on shewing cause against such a rule may or may not be so entitled. 6 T. R. 642

That it need not;

See *R.* v. *Harrison.* 6 T. R. 60

11. An affidavit made after such a rule is made absolute, must be entitled. 6 T. R. 642

12. Affidavits (and motions) for an attachment in a civil suit are proceedings on the civil side of the court until the attachment issues, and must be entitled with the names of the parties; but as soon as the attachment issues, the proceedings are on the crown side and from that time the king is to be named as the prosecutor. *Wood* v. *Webb* (explaining the case of *R.* v. *The Sheriff of Middlesex*, see *Attachment* I.) 3 T. R. 253

13. The affidavits made in answer to a rule nisi for an attachment, must be entitled on the *civil* side of the court in the cause out of which the motion arises: but after the rule for the attachment is granted the affidavits in any matter concerning such attachment are entitled on the *crown* side. *Whitehead & al.* v. *Firth.* 12 E. R. 165

14. Affidavits to set aside an attachment that has been *granted* (though not *issued*) in the course of a civil suit must be entitled "*R.* v. *The Party to be attached*, &c. *R.* v. *The Sheriff of Middlesex*. 7 T. R. 439

The same v. *The same*. 7 T. R. 527

15. An affidavit to support a rule *nisi* for staying proceedings on a bail bond, should be entitled in the action against the bail.

Roberts v. *Giddins*. 1 B. & P. 337

16. The christian names as well as the surnames of the parties must be inserted in the title of an affidavit produced to shew cause against any rule.

Fores v. *Diemar*. 7 T. R. 661

17. Where an affidavit was filed without any title, the Court of K. B. refused to take any notice of it, though the adverse party was willing to wave the objection. *(A point cited.)* 2 T. R. 644

18. Affidavit entitled "In the King's Bench," upon which the Attorney-General had filed an information *ex officio* against the defendant, was permitted to be read in aggravation after judgment by default.

R. v. *Morgan*. 11 E. R. 457

19. In the Court of C. P. a rule (to set aside execution) was discharged, because the affidavit on which the rule *nisi* was obtained was not entitled in any court: the words "in the" only being prefixed.

Osborn v. *Tatum*. 1 B. & P. 271

IV. *On Judgments in Criminal Cases; as in Aggravation, &c.*

1. When a defendant, who has suffered judgment by default in a criminal prosecution, is brought up for judgment, each party should come prepared with affidavits disclosing his own case (if he mean to produce any affidavit at all); but if in the course of the enquiry the court wish to have any point further explained, they will give the defendant an opportunity of answering it on a future day. *R.* v. *Wilson*. 4 T. R. 487

2. When a defendant who has been convicted on an indictment comes up to receive judgment, the prosecutor may read affidavits in aggravation, though made by witnesses who were examined at the trial, which affidavits the defendant is at liberty to answer.

The King v. *Sharpness*. 1 T. R. 228

3. Where a defendant in a prosecution had suffered judgment to go by default, and came up to receive judgment, the prosecutor was permitted to read affidavits in aggravation, containing expressions made use of by the defendant confirming and aggravating his guilt, which had been uttered by him in the hearing of two persons, and by them afterwards related to the persons making the affidavits, the prosecutor having first entitled himself to this evidence by swearing to an application to both those persons to come forward with their testimony, which they had refused, and it appearing to the court that those witnesses were under the control of the defendant. *The King* v. *Archer, M.* 28 *G.* 3. 2 T. R. 204, *n.*

4. Otherwise, where it does not appear that such third person is under the control or influence of the defendant.

R. v. *Pinkerton*. 2 E. R. 357

N. In this last case some doubt seems to be cast on the authority of *The King* v. *Archer*.

5. If a person required to answer the matters of an affidavit, swear to an incredible story, the court will grant an attachment against him, though he positively deny the malpractices imputed to him. *In the matter of Crosley*. 6 T. R. 701

V. *Supplementary; or other additional Evidence; and Counter Affidavits.*

1. If the affidavit on which the defendant is held to bail be defective, the defect cannot in general be supplied by another affidavit. *Jacks* v. *Pemberton*. 5 T. R. 552

2. The Court of C. P. will never receive a supplemental affidavit, unless to supply something ambiguous on the face of the original affidavit, and which the court for its own satisfaction wishes to have explained. *Green* v. *Redshaw*. 1 B. & P. 227

3. If a plaintiff executor hold a defendant to bail upon an affidavit stating the debt to be due, "as appears by the testator's books," but omitting to add, "and which the deponent believes to be true," the Court of C. P. will allow the plaintiff to swear to his belief in a supplemental affidavit. *Garnham Executrix* v. *Hammond*. 2 B. & P. 298

4. If an affidavit to hold to bail be made by a person *prima facie* incompetent to make it: *Qu.* Whether circumstances proving him to be competent can be shewn by affidavit, for cause against a

rule for discharging the defendant on a common appearance.

Bolt v. *Miller*. 2. B. & P. 420

5. No counter affidavit can be received in K. B. in order to contradict or do away the effect of an affidavit to hold to bail on the merits. And though such counter affidavit might be received to shew that the defendant had been before holden to bail for the same cause of action here, yet it will not avail to shew that he was before so holden to bail in a foreign country; at least where it did not distinctly appear that the defendant could have the same redress and benefit by the proceedings abroad as here.

Imlay v. *Ellefsen*. 2 E. R. 453

6. If a rule to shew cause why there should not be judgment, as in case of a nonsuit, be discharged on an affidavit which contains an answer false in itself, the Court will not afterwards open the matter on an affidavit which disproves the contents of the former one; though if they see reason to doubt the truth of the first affidavit at the time, they will suspend their judgment till the matter be examined into. *Davis* v. *Cottle*. 3 T. R. 405

7. An affidavit to hold to bail stated the debt to arise *on a bill of exchange or order*, drawn by *A.* and accepted by defendant,—On the face of the affidavit alone the Court refused to order the bail bond to be delivered up—But on a subsequent motion on reading the affidavit *and the declaration*, by which latter it appeared that the instrument was not a bill of exchange, they ordered the bond to be delivered up on defendant's filing common bail.

Wilks v. *Adcock*. 8 T. R. 27

VI. *Swearing; the Mode and Jurisdiction.*

1. The Court will in no case issue an attachment against a party at the suit of another, where the affidavits on which the motion is founded are sworn before the agents of the prosecutor.

R. v. *Wallace*. 3 T. R. 403

2. An affidavit may be taken before the clerk of the attorney in the cause, if the clerk be empowered to take affidavits at all.

Goodtitle d. Pye v. *Badtitle*. 8 T. R. 638

3. Where an affidavit is taken before a commissioner of *B. R.* by any person who from his signature appears to be illiterate, the commissioner shall certify in the jurat that the affidavit was read in his presence to the party making the same, and that such party seemed perfectly to understand the same; and also that the said party wrote his signature in the presence of the commissioner.

Reg. Gen. E. 31 *G.* 3. 4 T. R. 284

4. An affidavit taken before a judge at *nisi prius*, upon an information issuing out of this Court, which affidavit was returned here, is considered as taken under the authority of the Court, and they will take cognizance of the contents, and grant an information thereon. *R.* v. *Jollisse*. 4 T. R. 285

5. The Court will take cognizance of affidavits sworn before foreign magistrates if properly authenticated to them. *Dalmer* v. *Barnard*. 7 T. R. 251

6. An affidavit, purporting to have been taken before *J. C.* high bailiff and chief magistrate of the district of *Douglas* in the *Isle of Man*, is sufficiently authenticated by an affidavit taken in this court, stating that the party making it knew the subscription "*J. C.*" *&c.* at the foot of the other affidavit, to be the hand-writing of *J. C.* 7 T. R. 251

7. The Court of C. P. held that the affidavit of the acknowledgment of a warrant of attorney to suffer a recovery, taken before an ordinary magistrate in a foreign country, must be attested by a notary public.

Ex parte Worsley 2 H. B. 275

8. But the Court will, from courtesy, dispense with such attestation, in the case of an affidavit taken before a great judicial officer in *Ireland*.

2 H. B. 275

9. An affidavit of debt made by a plaintiff residing in a foreign country, before a foreign magistrate whose signature to the jurat, and authority to administer oaths and take affidavits there, was verified by a proper affidavit in this country, is a sufficient foundation for a judge's order to hold a defendant to special bail.

Omealy v. *Newell*. 8. E. R. 364

10. It is no objection to an affidavit to hold to bail that it is not intituled "in the King's Bench," or that it appears to have been taken before "*A. B.* a commissioner," *&c.* without adding "of the Court of K. B." if in fact he were a commissioner of that court. *Kennet and Avon Canal Company* v. *Jones*. 7 T. R. 451

11. The Court of C. P. disallowed the objection that no place was mentioned in the *jurat* of the affidavit. 1 B. & P. 105

12. Where several persons join in an affidavit, their names must be written in the jurat; and no affidavit can be read if there be any interlineation or erasure in the jurat. *Reg. Gen. M.* 37 *G.* 3. 7 T. R. 82

13. When a defendant having been recently discharged from a prison, was afterwards permitted to continue to lodge there at night, having no other residence, his describing himself in an affidavit, as *late* of that prison is sufficient, within the rule of the Court of K. B. requiring the true place of every deponent to be specified—*Secus* in the case of a person leaving one place of residence, and actually residing elsewhere. *Sedley* v. *White.* 11 E. R. 528

AGENT.

I. *Where liable to sue, or be sued personally.*

1. An officer appointed by government treating as an agent for the public, is not liable to be sued upon contracts made by him in that capacity. *Mackheath* v. *Haldimand.* 1 T. R. 172

2. Not even though he contract by deed, if it be *on account of government.* *Unwin* v. *Wolseley.* 1 T. R. 674 (See DEED 5. ASSUMPSIT II. 15, 16, 17.)

3. Semble if a person describing himself as agent for another residing abroad enter into a contract here, he is personally liable. *Eyre C. J.* *De Gaillon* v. *L'Aigle.* 1 B. & P. 368

4. If one take the security of the agent unknown to the principal, and give the agent a receipt as for money due from the principal, on the faith of which the principal deals differently with his agent, the principal is discharged although the security fail *Aliter*, if the principal do not shew that he was injured by means of such false voucher, and the omission of the party to inform him of the truth in due time. *Wyatt* v. *The Marquis of Hertford.* 3 E. R. 147 (And see *Ward* v. *Felton*, 1 E. R. 507 tit. SHIP.)

5. Where goods are ordered for a ship by the owners, before the appointment of the captain, though some are not delivered till afterwards, yet as no personal credit is given to the captain, he is not answerable for any of them. *Farmer* v. *Davies.* 1 T. R. 108

6. But where the captain contracts for the goods, though they are furnished for the use of the ship, he is answerable in respect of this contract. 1 T. R. 108

7. So that in such case, the tradesman has a claim both on the captain and owners, as well as a specific lien on the ship itself. 1 T. R. 108

8. *A.* as captain, by charterparty agreed to receive a cargo of the agents and assigns of *B.*—*A.* having received a cargo abroad, signed a bill of lading stating the goods to have been shipped by order of *C.*, and to be delivered to his order. In an action for negligence in stowing the goods brought by *C.* against *A.* held that *C.* was only an agent and that the action should have been brought in the name of *A.* *Moores* v. *Hopper.* 2 N. R. 411

II. *How far his principal is bound by his Acts.*

1. A plaintiff is bound by the acts of his attorney's agent in town. *Griffiths* v. *Williams.* 1 T. R. 710

2. Where there is an agent in town, all notices are given to him, and are not sent into the country. *Buller J.* 1 T. R. 711 (But see *Hayes* v. *Perkins*, 3 E. R. 568)

3. Where an agent is employed to buy goods, an acknowledgment under his hand-writing of his having received them is evidence of a delivery to the buyer. *Biggs* v. *Lawrence.* 3 T. R. 454

4. A special agent under a limited authority cannot bind his principal by any act beyond the scope of such authority. *Fenn* v. *Harrison.* 3 T. R. 757

5. Therefore where it appeared in evidence that the holder of a bill of exchange desired *A.* to get it discounted, *but positively refused to indorse it*, and *A.* delivered it to *B.* for the same purpose, informing him to whom it belonged; and *B.* finding, that he could not dispose of it without indorsing it, was prevailed upon to do so by *A.*'s telling him that he would indemnify him; but the indorsee took it upon the credit of the names on the bill, without any knowledge of the real owner; it was held that although such original holder afterwards promised to pay the bill, such promise could not

support an action by the indorsee, it being *nudum pactum*. 3 T. R. 757

6. It appearing on evidence, however, on a new trial, that the holder of the bill *did not say he would not indorse it*, the Court held that *A.*'s employers were bound by his act, and liable to refund on the bill's being dishonoured; and that the subsequent promise to pay was decisive against them. 4 T. R. 177

7. A factor cannot pawn the goods of his principal.

Daubigny v. *Duval*. 5 T. R. 604

8. And if he do, the principal may recover the value of them in trover against the pawnee, on tendering to the factor what is due to him, without any tender to the pawnee. 5 T. R. 604

9. But this rule does not apply to the case of a banker, (or it sould seem any other person), pledging *indorsed* bills of exchange deposited in his hands by a customer. 1 B. & P. 651 See *Collins* v. *Martin*, 1 B. and P. 648 BANKRUPT X.)

10. A factor cannot pledge the goods of his principal by indorsement and delivery of the bill of lading, any more than by the delivery of the goods themselves, though the indorsee knew not that he was the factor.

Newson v. *Thornton*. 6 E. R. 17

11. A broker when he bought goods for his principal agreed for $\frac{1}{2}$ *per cent.* to indemnify him from any loss on the resale; it was held that this undertaking was discharged when the principal had a fair opportunity of selling to advantage, but neglected it, though he was afterwards obliged to sell at a loss. *Curry* v. *Edensor*. 3 T. R. 524

12. Fraud will vitiate any transaction, though the principal person interested do not personally take any part in the fraud; for the principal is civilly responsible for the acts of his agent.

Doe d. Willis v. *Martin*. 4 T. R. 39

13. The property of goods bought by an agent for the vendee, delivered by him to the vendee's packer, in whose hands they are attached by the vendee's creditors, revests in the vendor, so as to avoid the attachment, by the vendee's having countermanded the purchase by letter to his agent dated before such delivery, though not received till afterwards, the vendor assenting to take back the goods.

Salte v. *Field*. 5 T. R. 211

AGREEMENTS.

I. *Of the Interpretation and Operation of.*

1. Where a lease came into the hands of the original lessor by an agreement entered into between him and the assignee of the original lessee, "that the lessor should have the premises as mentioned in the lease, and should pay a particular sum over and above the rent annually, towards the good-will already paid by such assignee; such agreement operates as a surrender of the whole term.

Smith v. *Mapleback*. 1 T. R. 441

2. The sum in such an agreement is considered as a sum to be paid annually in gross, not as rent, and the assignee cannot distrain either for that, or for the original rent; but he has a remedy by assumpsit for the sum reserved for the good will. 1 T. R. 441

3. An agreement between a debtor and his creditors that they will accept a composition in satisfaction of their respective debts, to be paid in a reasonable time, cannot be pleaded to an action brought by one of the creditors to recover his whole demand. *Heathcote and Others* v. *Crookshanks*. 2 T. R. 24

4. But if the debt had been ascertained by the agreement, and a fund provided, and all the creditors bound to forbear, seems that would have been a good plea. 2 T. R. 24 (See *post* II. 22, &c.)

5. So if the debtor had assigned over all his effects to a trustee in order to make an equal distribution among all his creditors, that would have been a good consideration in law for the promise. 2 T. R. 24

6. Acceptance of a less cannot be a satisfaction in law of a greater sum then due: nor can it operate as an extinguishment of the original cause of action, though accompanied by a conditional promise to pay the residue when of ability.

Fitch v. *Sutton*. 5 E. R. 230

7. Where a debtor entered into agreement with his creditors, whereby they agreed to receive 20*l.* per cent. in satisfaction of their several debts, and released the remainder in consideration that the composition should be secured by the acceptance of one of the creditors, which accordingly was given, and paid when due: held that such agreement was binding on the plaintiff one of the creditors, and that

his suing the debtor after receiving the composition was a fraud upon the rest of the creditors.

Steinman v. *Magnus.* 11 E. R. 390

8. The creditors of a bankrupt entered into a deed of composition to receive 8*s.* in the pound in full discharge of their debts, and agreed to release every thing beyond that to the bankrupt, and join in a petition to the chancellor, to supersede the commission; one of the creditors having two distinct debts due from the bankrupt, for one of which he held bills for the full amount, received his dividend of 8*s.* in the pound on both debts, and then recovered the full value of some of the bills; held, that the bankrupt was entitled to recover the money so obtained on the bill in an action for money had and received.

Stock v. *Mawson.* 1 B. & P. 286

9. An agreement declared on to sell oats at so much *per* bushel, must be taken to mean the *Winchester* bushel, and will not be proved by evidence of an agreement to sell by some other bushel.

Hockin v. *Cooke.* 4. T. R. 314

10. A promise in writing directed to *A.*, *B.*, and *C.*, (a house in trade,) to pay for goods to be furnished to *D.*, does not extend to goods furnished to *D.* by *B.* and *C.* after *A.* had withdrawn from the partnership.

Myers v. *Edge.* 7 T. R. 254

(See BOND II. 1, 2, 3, 4.)

11. If the abandonment of a contract be made the ground of an action, it is not competent to the plaintiff to shew that a contract has existed and been abandoned, without proving a specific contract. 1. B. & P. 306

12. *A.* being tenant to *B.*, under a lease containing covenants, by which the former was bound to fetch 75 bushels of coals from *Pool* yearly, and deliver them at the mansion-house of the latter and also to supply him with as much good wheat as he should want in his family at 5*s. per* bushel, it was agreed between them that the lease should be surrendered up and a new one granted, omitting the above covenants. A new lease was accordingly executed, and at the same time an agreement was entered into, whereby *A.* agreed with *B.* that he would fetch and bring to the dwelling-house of *B.*, his heirs and assigns, 75 bushels of coals yearly, for 12 years (the term of the new lease), and yearly supply *B.*, his heirs and assigns, with as much good wheat as he should want in his family at 5*s. per* bushel. *B.* having parted with his reversion in the farm, and also quitted the mansion-house, in which he resided at the time when the agreement was made; held that he was not entitled to maintain an action against *A.* for refusing to deliver the wheat at the stipulated price; that the agreement being entire, must receive one uniform construction; and as it was clearly local in respect of the delivery of coals, it could not be deemed personal with respect to the wheat: Also, that no parol evidence could be admitted to explain the agreement, there being no latent ambiguity.

Coker v. *Guy.* 2. B. & P. 565

13. *A.* agrees by parol to sell an estate to *B.* on certain terms, provided *B.* will continue *C.* his tenant, ***not for one year only, but from year to year*** (*C.* having just before been let into possession under a contract for the purchase of the estate, which he had failed to pay for in time, and had therefore forfeited his deposit); and *A.* thereupon agreed to take *C.*'s forfeited deposit as part of the purchase-money: *A.* and *B.* afterwards reduce their agreement respecting the purchase into writing, in which no notice is taken of the stipulation concerning *C.*'s tenancy; yet held, that this stipulation, being collateral to the written agreement, was binding upon *B.*; and that the agreement operated as a tenancy for two years certain at least, though no rent was then mentioned, but was to be settled afterwards; and that the tenancy could not be put an end to at the end of the first year by six months' previous notice to quit.. *Denn d. Jacklin* v. *Cartwright.* 4 E. R. 29

14. The defendant, in consideration of his having procured a man to serve on board a ship for a particular voyage, received from the plaintiff four guineas, and afterwards signed a note, by which he engaged to pay the plaintiff four guineas, if the said man, a seaman, did not proceed in the said ship upon the intended voyage; the man was discovered not to be a seaman, and the captain of the ship refused to receive him on board: held that the above note did not amount to an undertaking on the part of the defen-

dant that the man was a seaman, but that it was merely a stipulation for a personal service.

Levy v. *Haw*, 1 W. P. T. 65

15. A person agreed to deliver 100 bags of hops at a certain price by a certain time, and having delivered only 12, commenced an action for the price before the expiration of the time fixed for the delivery of the remainder: held that the contract being entire could not be split, and that such action could not be maintained.

Waddington v. *Oliver*. 2 N. R. 61

II. *Fraudulent, illegal, or void: or the contrary.*

1. An agreement in writing to put in good bail for a person arrested on mesne process, at the return of the writ, or surrender the body, or pay debt and costs, made by a third person with the bailiff of the sheriff, in consideration of his discharging the party arrested, is void by 23 *H.* 6. *c.* 9.

Rogers v. *Reeves*. 1 T. R. 418

2. But the undertaking of an attorney for the appearance of a defendant is not within the statute, because it is given to the plaintiff in the action, and not to the sheriff. 1 T. R. 418

3. Where goods are delivered under an agreement to take *a specific parcel* of copper money in payment, a delivery of such copper will be a good bar to an action for the value of the goods, though in fact it was counterfeit money. *Alexander* v. *Owen*. 1 T. R. 225

4. An illegal contract, if rescinded as to part, must be rescinded as to the whole: therefore if a plaintiff furnishes goods *in consideration of counterfeit money* to be paid him, and he afterwards refuses to take it, he cannot recover in an action the value of the goods delivered. 1 T. R. 226, 7

5. Where money had been paid for insuring tickets in the lottery, the Court of C. P. *(dissent. Loughborough C.J.)* held that it might be recovered back from the office-keeper.—All the court were of opinion that a contract declared by a statute to be illegal, was not made good by a subsequent repeal of the statute,

Jaques v. *Withy & al.* 1 H. B. 65

6. Before a party can entitle himself by a civil action to relief from an usurious contract, he must tender all the money really advanced.

Fitzroy v. *Gwillim*. 1 T. R. 153

7. Where goods were pawned to a broker for a certain sum, and usurious interest agreed to be paid thereupon, the pawner of the goods cannot maintain an action of trover for them in order to get rid of the usurious contract, without first tendering the money which had been actually advanced, and legal interest. 1 T. R. 153

8. If *A.* agree to give *B.* a certain sum for goods, in advancement of *C.*, any secret agreement between *B.* and *C.* that the latter shall pay a further sum, is void as a fraud on *A.* although the bill of sale is made to *A.*, and *B.* cannot recover such further sum against *C.*

Jackson v. *Duchaire*. 3 T. R. 551

9. No action can be maintained for the breach of an agreement, "to dance at the King's Theatre in the *Haymarket*, or at such other place as the plaintiff should appoint;" if it appear that no licence for that theatre was granted by the Lord Chamberlain, as required by *stat.* 10 *G.* 2. *c.* 28., and that the plaintiff did not request the defendant to dance at any other place which was licensed.

Gwillim v. *Laborie* 5 T. R. 242

10. An agreement entered into by a number of dyers, pressers, bleachers, *&c.* at a public meeting, that they would not receive any more goods to be dyed, *&c.* but on condition that they should respectively have a lien on those goods for their general balance, is good in law: and any one who after notice of it delivers goods to any of those persons must be taken to have assented to those terms; and consequently cannot demand goods so delivered to any such dyer, *&c.* without paying the balance of his general account. *Kirkman* and another, assignees of *Walker* a bankrupt v. *Shawcross*. 6 T. R. 14

11. To debt on bond the defendant pleaded that the bond was given to secure payment of the price of goods agreed to be sold and delivered in *London* by the plaintiff to the defendant, to be by the latter shipped to *Ostend*, and from thence re-shipped for the *East Indies*, and there trafficked with clandestinely. Held a sufficient bar to the action; the case being within stat. 7 *G.* 1 *c.* 21. which avoids all contracts for supplying cargoes to foreign ships in such a trade. *Lightfoot & al.* v. *Tenant*. 1 B. & P. 551

12. *A. B.* and *C.* became partners in

insuring ships (contrary to the statute 6 G. 1. c. 18. s. 12.) but it was agreed that the policies should be underwritten in the name of *A.* only; several policies were effected, and the premiums received by *C.* and *D.* who were partners as brokers; it was held that *A.* could not recover those premiums from *C.* and *D.*

Booth v. *Hodgson.* 6 T. R. 405

13. Where on such a partnership *A.* had paid the whole of the losses, the Court of C. P. held that he could not maintain an action against his partner to recover a share of the money so paid. *Mitchell & al.* v. *Cockburne.* 2 H. B. 379. *Aubert* v. *Maze.* 2 B. & P. 371

14. It being contrary to stat. 7 & 8 *W.* 3. c. 4. for a candidate to furnish provisions to *any* voters after the teste of the writ, an innkeeper cannot recover against a candidate for provisions so furnished at his request.

Ribbans v. *Crickett & al.* 1 B. & P. 264

15. A contract entered into by a practising attorney to relinquish his business and recommend his clients to two other attornies for a valuable consideration, and that he would not himself practise in such business within certain limits, and would permit them to make use of his name in their firm for a certain time, but without his interference, &c. was holden to be valid in law. *Bunn, Executor of Bunn,* v. *Guy.* 4 E. R. 190

16. *A.* being possessed of an office in a dock-yard, *B.*, in order to induce him to procure himself to be superannuated, and retire on the usual pension, agrees (without the knowledge of the navy board, to whom the appointment belongs) in case *B.* should succeed him in the office, to allow him a certain annual share of the profits; *A.* retires, *B.* is appointed to succeed him, but does not perform the agreement. *A.* can maintain *no action against B. on the agreement.*

Parsons v. *Thompson.* 1 H. B. 322

17. *A.* by the interest and on the application of *B.* to the lords of the treasury, is appointed customer of a port, having previously entered into an agreement, declaring that his name was used in the application in trust for *B.* that he would appoint such deputies as *B.* should nominate, and would empower *B* to receive the profits of his office to his own use. On the failure of *A.* to comply with the agreement, *no action upon it* will lie against him.

Garforth v. *Fearon.* 1 H. B. 327

18. A sale (by the owner) of the command of a ship, employed in the East India Company's service, without the knowledge and against the bye laws of the company is illegal; and the contract of sale cannot be the foundation of an action. *Blachford & al.* (executors) v. *Preston.* 8 T. R. 89 (See stat. 39 *G.* 3. *c.* 89.)

19. A party cannot recover upon a written contract made in *Jamaica,* which by the laws of that island was void for want of a stamp.

Alves v. *Hodgson.* 7 T. R. 241

20. A covenant by a friend of a bankrupt to pay all his creditors their full debts, in consideration that they will not proceed any further upon the commission, is good in law.

Kaye v. *Bolton.* 6 T. R. 134

21. An insolvent assigned over his effects for the benefit of his creditors; and in the deed there was a proviso that the shares of those creditors who did not execute it before a given day should be paid by the trustee to the insolvent; an agreement made between the insolvent and a creditor, even after that day, that the latter should sign the deed and the former pay the remainder of the whole debt, is fraudulent and void.

Jackson v. *Lomas.* 4 T. R. 166

22. By a deed of composition between a trader and his creditors it was agreed that the trader should give them his bills, accepted by a friend, for 10*s.* in the pound, payable in certain proportions at fixed periods, and his own promissory notes for 5*s.* more, and that the creditors should be at liberty to take his own notes only for their full demands if they pleased; one of the creditors who signed the deed took the bills from the debtor accepted by his friend for the whole 15*s.* in the pound, payable at the same respective times as the bills agreed to be given by the deed of composition: the payment of these bills was resisted upon the ground that it was a security beyond that agreed for, and greater than the other creditors obtained: but the transaction was adjudged fair, the creditor not receiving by it more than the others.

Feise v. *Randall.* 6 T. R. 146

23. A trust-deed is proposed to the cre-

ditors at large of an insolvent, whereby they all engage to accept payment of their *whole* debts *by certain instalments*, the four first of which are to be *guaranteed* by collateral security, the two last to remain *upon the single security of the insolvent:* several of the creditors refused to sign unless the plaintiffs do; and the plaintiffs stipulate privately with the insolvent as the condition of their signature that he shall procure them collateral security *for the two last instalments* as well as the prior ones; conceiving that they had collateral security originally to cover their debt; and upon the faith of such private agreement they sign the general trust-deed, which is then signed by the rest of the creditors; held that such private agreement is a fraud upon the other creditors, and void; although the effect of it were not to secure to the plaintiffs the payment of more money than the other creditors were to receive, but only further security for the same sum.

Leicester et al. v. *Rose.* 4 E. R. 372 N. In this case, the preceding case of *Feise* v. *Randall* was said to have been decided without particular consideration, and on the ground that no fraud was intended against the other creditors.

24. If in consequence to a debtor representing to one of his creditors, that if he will agree to accept a composition for his debt, all the other creditors will do the same, such creditor do agree, *&c.* the agreement is not binding on him if that representation be untrue.

Cooling v. *Noyes.* 6 T. R. 263

25. Whether an agreement by creditors to take a composition in discharge of their debts be not binding, though no fund be appropriated for the payment of the composition? *Qu.* 6 T. R. 263

III. *Non-performance, what shall excuse.*

1. A contract of sale may be rescinded by the consent of the vendor and vendee before the rights of other persons are concerned. *Smith* v. *Field.* 5. T. R. 402

2. But where the vendee wished to return the goods, and the vendor instituted an attachment to attach the goods in the hands of a packer, as the property of the vendee, it was considered as an election by the vendor not to rescind the contract; and the vendee having since become a bankrupt, it was held that the vendor could not recover the goods from the packer in trover. 5 T. R. 402

3. The insolvency of the plaintiff after the making of a contract with the defendant for the delivery of goods to the former is a good defence for the latter in an action for the non-delivery pursuant to the agreement. *Reader* v. *Knatchbull.* Sittings at *Westminster* after *M.* 1786, *cor.* *Buller* J. 5 T. R. 218, *n.*

4. *A.* agreed to underlet his house to *B.* the latter paying for the furniture at an appraisement; held that *B.* was excused from performance of the agreement, because *A.* at the time he quitted the house, was in arrear for rent to his landlord.

Partridge v. *Sowerby.* 3 B. & P. 172

5. The defendants contracted to carry the plaintiff's goods from *Liverpool* to *Leghorn;* on the vessel's arriving at *Falmouth* in the course of her voyage, an embargo was laid on her "*until the further order of council;*" held that such embargo only suspended, but did not dissolve, the contract between the parties; and that even after two years, when the embargo was taken off, the defendants were answerable to the plaintiff in damages for the non-performance of their contract. *Hadley* v. *Clarke & al.* 8 T. R. 259

6. If *A.* contract with *B.* to fetch a cargo of corn from *C.* and on his arrival there find that the government has prohibited the exportation of corn, and therefore, after staying out his demurrage days return in ballast, *B.* is notwithstanding liable to pay freight; but not demurrage, if *A.* knew of the prohibition before he entered the port of *C*, though demurrage were allowed by the contract. *Blight* v. *Page.* Sittings after *Mich.* T. 1801. *cor.* Lord *Kenyon.* 3 B. & P. 295. *n.*

7. If a *British* merchant charter a *Swedish* ship on a voyage to *St. Michael's* for a cargo of fruit, and the charterparty contain the usual exception against the restraint of princes, and the ship be prevented from reaching *St. Michael's* within the fruit season by an embargo laid on *Swedish* vessels by the *British* government, the *Swedish* owner cannot by proceeding on the voyage after the embargo is taken off, entitle himself to recover the freight against the *British* merchant.

Touteng v. *Hubbard.* 3 B. & P. 291

ALIEN.

1. The son of an alien father and *English* mother, born out of the king's allegiance, cannot inherit to his mother in this country. *Doe d. Count Dunoure* v. *Jones.* 4 T. R. 300
2. No action can be maintained either by or in favour of an alien enemy. *Brandon* v. *Nesbitt.* 6 T. R. 23
3. Nor of an Englishman living in, and carrying on trade under the protection, and for the benefit of an hostile state. 3 B. & P. 113 (And see *M'Connell* v. *Hector*, 3 B. & P. 113. BANKRUPT VII.)
4. Therefore a plea of alienage to an action on a policy of insurance brought in the name of an *English* agent for his principal, an alien, such interest appearing on the record, is a good plea; and a replication to such a plea, that the alien is indebted to the agent (the plaintiff) in more money than the value of the property insured, cannot be supported. 6 T. R. 20
5. But as this is an odious plea the defendant must state that the plaintiff was born in a foreign country at enmity with our king, and that he came here without letters of safe conduct from our king. *Casseres* v. *Bell.* 8 T. R. 166
6. A native of a foreign state in amity with this country, taken in an act of hostility on board an enemy's fleet, and brought to *England* as a prisoner at war, is not disabled from suing while in confinement, on a contract entered into as as a prisoner at war. *Sparenburgh* v. *Bannatyne.* 1 B. & P. 163
7. The insurance of an alien enemy's property is illegal, and no action can be sustained upon it. *Bristow* v. *Towers.* 6 T. R. 35
8. The Court of C. P. held that goods purchased in *Holland* during hostilities between that country and *Great Britain* by a British agent resident there, and shipped for British subjects, might be lawfully insured in this country. *Bell & al.* v. *Gillson.* 1 B. & P. 345 But the Court of K. B. (after hearing a second argument by Civilians) determined that all trading with an enemy without the king's licence is illegal: and also that it is illegal for a subject in time of war, without the king's licence, to bring over in a neutral ship goods from an enemy's port, which were purchased by an agent of such subject resident in the enemy's country, after the commencement of hostilities, although it may not appear that they were purchased of an enemy. *Potts* v. *Bell & al.* 8 T. R. 548 (And see *Robinson's Admiralty Reports*, 196; 217.)
9. It is legal to trade with the subjects of an enemy's country by the king's licence. But if it be provided in such licence, that the party acting under it shall give bond for the due exportation to the places proposed of the goods intended to be exported to such country, and they are exported without such bond being given, such exportation is illegal, and the owners cannot recover on a policy to protect the goods. *Vandyck* v. *Whitmore.* 1 E. R. 475
10. If a licence to export and deliver goods to an enemy's country be granted for a limited time, it is not sufficient that the goods were *shipped* before the expiration of the time, the ship not sailing till afterwards. 1 E. R. 475
11. Under § 7 of *stat.* 34 *G.* 3. *c.* 9. prohibiting his majesty's subjects from paying money to any persons residing under the government of *France*, the Court of C. P. refused to discharge a defendant on a common appearance, on the ground of the plaintiff's residence in *Holland*, which was suggested to be under the dominion of *France*. *Pieters & al.* v. *Luytjes.* 1 B. & P. 1
12. If the defendant, an alien, be sent out of the kingdom under the alien act 33 *G.* 3. *c.* 4. the court will permit the bail to enter an exoneretur on the bail piece, unless they are indemnified, or have money in their hands belonging to the defendant sufficient to answer the plaintiff's demand. *Merrick* v. *Vaucher.* 6 T. R. 50 *Coles* v. *De Hayne.* 6 T. R. 52
13. Bail of an alien who was sent out of the kingdom applied to be discharged on payment of 1000*l.* deposited with them; which sum the plaintiff had recovered by verdict; but the court held them liable for the costs also. *Coles* v. *De Hayne.* 6 T. R. 246
14. If such alien defendant be sent out of the kingdom after he has given a bail bond and before the return of the writ, the court will order the bail-bond to be cancelled. *Postel* v. *Williams.* 7 T. R. 517
15. Where the defendant had been held

to bail on an instrument entered into in *France*, by which his property only and not his person was, according to the law of that country, made liable, the Court of C. P. (*dissent. Heath* J.) on motion, ordered the bail bond to be cancelled on defendant's entering a common appearance. *Melan* v. *Fitzjames (Duke)*. 1 B. & P. 138 N. In the case of *Imlay* v. *Ellefsen*, 2 E. R. 455, tit. AFFIDAVIT V. Lord *Ellenborough* signified his dissent from this determination.

16. The defendant, an alien within the terms of the 38 *G.* 3. *c.* 50. § 9. (which exempts from arrest for debts contracted abroad, aliens residing in this country in consequence of a revolution in their own), having entered into an agreement with the plaintiff in a foreign country, the latter, in pursuance of the agreement, laid out money in *England;* after which the parties came to an adjustment in *England*, and the defendant acknowledged the debt. The defendant, having been holden to bail for money laid out by the plaintiff in *England*, and on an account stated in *England*, disclosed the above circumstances by affidavit, whereupon the court discharged him on a common appearance.

Sinclair v. *Charles Philippe* Monsieur *de France*. 2 B. & P. 363

17. The Court of K. B. refused to stay judgment and execution on a summary application, because the plaintiffs after verdict became alien enemies.

Vanbrynen v. *Wilson*. 9 E. R. 321

AMENDMENT.

In general.

1. All amendments are within the discretion of the court, and are allowed in furtherance of justice under the particular circumstances of the case. R. v. *Grampond Corporation*. 7 T. R. 699.

2. After a party has once amended on a demurrer, the court will not give him leave to amend again on a second demurrer. *Kinder* v. *Paris*. 2 H. B. 561

3. Such mistakes as are made by the clerk in court may be amended; but those in the pleadings being made by the party himself cannot.

Green v. *Rennet*. 1 T. R. 783

4. The Court of C. P. refused to permit a declaration in an action of covenant brought against executors in their own right, and who had merely acted in the disposition of the testator's effects, to be amended after demurrer.

1 H. B. 37

5. The defendants appealed to the sessions against a conviction on a penal statute, where the conviction was affirmed: afterwards the record was removed into the Court of K. B. by *certiorari*, where the conviction was quashed for a defect in the information; then the prosecutor moved either that the *certiorari* should be sent back to the magistrates, in order that they might return the original information, (which had not the defect), or that a mandamus might issue to compel the magistrates to proceed on the original information: but the Court of K. B. refused to make such a rule.

R. v. *Jukes & al.* 8 T. R. 625

I. *At what Time allowed:* (and see V.)

1. The court will not give leave to amend, as to the parties to the suit, in a *qui tam* action after a demurrer.

Evans q. t. v. *Stevens*. 4 T. R. 459

2. Where a *qui tam* action for usury had been depending four years, the court would not allow amendments to be made in the declaration, though the pleadings were still in paper.

Goff v. *Popplewell*. 2 T. R. 707

3. In such an action the court refused leave to amend the declaration after the time limited for bringing a new action, there appearing to have been unnecessary delay on the part of the plaintiff.

Steel q. t. v. *Sowerby*. 6 T. R. 171

4. And wherever there is unnecessary delay in carrying on the suit by the plaintiff, the Court of K. B. will not in their discretion permit any amendments to be made in a penal action. *Ranking & al. q. t.* v. *Marsh, Knt.* 8 T. R. 30

5. But the court will permit an amendment to be made in a penal action after the time limited for bringing another action, provided there is no unnecessary delay on the part of the plaintiff. *Cross* v. *Kaye*. 6 T. R. 543 *Maddock q. t.* v. *Hammett*. 7 T. R. 55

6. So too in the notice at the bottom of a declaration in ejectment.

Doe d. Bass v. Roe. 7 T. R. 469

7. But even in such a case the court will not permit an amendment to be made, if it introduce any new sub-

stantive cause of action, or any new charge against the defendant.

S C. 6 T. R. 544. 7 T. R. 55

8. An amendment allowed in an action for a penalty under the bribery act, by altering the venue from the county at large to an interior jurisdiction, after the time limited for commencing a new action; the particularity of the declaration making it appear probable to the court that the plaintiff was proceeding on the same fact for which the action was originally brought when laid by mistake in the wrong county, though there were no affidavit that it was the same. *Petre* v. *Craft* 4 E. R. 433

9. Such amendment allowed, though it appeared that there were distinct causes of action in the two different counties, upon an affidavit that the plaintiff proceeded on a mistake in supposing that both causes of action could be proved in the county where the election was holden. *Dover* v. *Mestaer*. 4 E. R. 435

10. Where a *sham* plea was put in, to which plaintiff pleaded a bad replication, he had leave to amend without payment of costs, after demurrer argued. *Solomons* v. *Lyons*. 1 E. R. 369

11. The court will give the plaintiff leave to amend the declaration in a civil action after the second term even against a prisoner; but they will not permit him *to add new counts* to his declaration in such a case.

Owens v. *Dubois*. 7 T. R. 698

12. After a verdict on a traverse to a return to a mandamus made by a corporation, the court would not allow the defendants to amend the return by setting forth a different constitution.

R. v. The Mayor and Burgesses of Grampond. 7 T. R. 699

13. The court will grant leave to amend a declaration on a special agreement according to the bill filed, by increasing the damages, even after verdict; setting aside the verdict, and granting a new trial.

Tomlinson v. *Blacksmith*. 7 T. R. 132

14. The Court of K. B. will grant leave to enter the continuances after verdict, in order to arrive at the justice of the case.

Doe d. Mears v. *Dolman*. 7 T. R. 618

II. *In Writs.*

1. If there be not fifteen days between the *teste* and the return of a *capias*, the Court of C. P. will allow the *teste* to be amended.

Bouchier v. *Wittle*. 1 H. B. 291.
Davis & al. v. *Owen*. 1 B. & P. 342

2. If the award of the writ of inquiry on the roll be right, the *teste* of the writ, if wrong, shall be amended by it. *Johnson* v. *Toulmin*. 4 E. R. 173

3. Leave granted to amend a special *capias*, in order that an application might be made to the Master of the Rolls to procure a new original.

Carr v. *Shaw*. 7 T. R. 299

4. A plaintiff recovered judgments against two defendants in *B. R.* and one of them brought a writ of error in *Cam. Scacc.* where the judgment was affirmed and costs given of the writ of error, and both the defendants were taken under a writ of execution on the whole sum including the costs of the writ of error as well as the original sum recovered; this court permitted the plaintiff to amend his writ of execution as to the defendant who did not join in the writ of error, by altering it to the original sum recovered.

Laroche v. *Washrough & al.* 2 T. R. 737

5. Where a *fi. fa.* was sued out into a different county from that in which the *venue* was laid, and the party suing it afterwards, took out a *fi. fa.* into the proper county, and got a return of *nulla bona* to warrant the *fi. fa.* which first issued, the Court of C. P. permitted the first writ to be amended, by adding the return of the *nulla bona* and the *testatum* clause, though the second writ was returnable several days before judgment was signed. *Meyer* v. *Ring*. 1 H. B. 541

6. So where a *fi. fa.* was sued out into one county (when it should have been a *test. fi. fa.*) without any original *fi. fa.*, and the plaintiff afterwards sued out an origin *fi. fa.*, the Court of K. B. permitted the party to amend the former on paying the costs.

Cowperthwaite v. *Owen*. 3 T. R. 657

7. A *fieri facias*, made returnable on a King's Bench instead of Common Pleas return day, was amended by the award of execution on the roll.

Atkinson v. *Newton*. 2 B. & P. 336

8. After a rule obtained to shew cause why the *test. ca. sa.* should not be set aside because not warranted by the judgment, and because there was no original *ca. sa.*, the Court of K. B.

permitted plaintiff to amend the *test. ca. sa.* agreeably to the judgment, and directed the sealer of the writs to seal an original *ca. sa.* to warrant it.

Shaw v. *Maxwell.* 6 T. R. 450

9. *A. B.* having been arrested on a *capias* sued out against him by the name of *C. B.* a bail-bond was given, by which *A. B.* arrested by the name of *C. B.* became bound, conditioned for the appearance of *A. B.* arrested by the name of *C. B.* The affidavit to hold to bail named the defendant properly *A. B.* The court amended the *capias* and return (but without prejudice to the Sheriff), and rejected an application by the bail to cancel the bail-bond.

Stevenson v. *Danvers.* 2 B. & P. 109

10. If a *capias per continuance* be *tested* on the same day as the original capias, a new original capias may be sued out to warrant it; though such new original bear *teste* before the cause of action acrued.

Davis v. *Owen & al.* 1 B. & P. 342

11. One of two plaintiffs died before interlocutory judgment, but the suit went on to execution in the name of both; after this and after a motion to set aside the proceedings for this irregularity, the court permitted the surviving plaintiff to suggest on the roll the death of the other before interlocutory judgment, and to amend the *ca. sa.* without paying costs.

Newnham v. *Law.* 5 T. R. 577

12. A *scire facias* against bail in error may be amended by the record of the recognizance.

Perkins v. *Petit.* 2 B. & P. 275

13. But the court (C. P.) do not think proper to cure any irregularities of which the bail are entitled to take advantage; and therefore refused to amend a *scire facias* against bail.

Fulwood v. *Annis.* 3 B. & P. 321

14. The Court of K. B. on a motion ordered two writs of *sci. fa.* against the principal on a judgment and the declaration thereon to be amended conformably to the judgment-roll.

Braswell v. *Jeco.* 9 E. R. 316

15. And in *scire facias* against the bail when there was a failure of the record through misprision of the officer of the court, the Court of C. P. permitted the recognizance to be amended.

Mann v. *Calou.* 1 W. P. T. 21

16. After verdict of guilty upon an indictment on the stat. 9 *Ann. c.* 14. for an assault on account of money won at gaming, the return to the writ of *certiorari* which had been issued at the instance of the defendant was amended by inserting in the return of the caption the true time when, and the names of the justices before whom, the quarter sessions at which the indictment was found was holden, and the names of the jurors by whom it was found. And the entry roll and record of *nisi prius* were also amended, as to the caption of the indictment (bnt not as to the names of the grand jurors), by making the same agree with the caption so amended.

R. v. *Hill Darley.* 4 E. R. 174

17. A return to a writ of *certiorari*, issued at the instance of the defendant, was amended by inserting therein the commission of *oyer* and *terminer*, by virtue of which, and also the names of the justices by whom, the court before whom the indictment was found was holden, on production of the said commission and the minutes taken by the clerk in court. And alsu the caption of the indictment was amended by inserting the names of the grand jurors. *R.* v. *Atkinson.* T. 24 *G.* 3. 4 E. R. 175. *n.*

18. Also the entry roll in the Treasury, and the record of *nisi prius*, in the same cause, were amended, as to the caption of the indictment, by making it agree with the amended caption. 4 E. R. 176. *n.*

19. But the amendment of the *roll* by inserting *the names of the grand jurors* is unnecessary, the practice of the Crown Office warranting the omission of their names. *Per Buller J. R.* v. *Aylett. H.* 27. *G.* 3. 4 E. R. 176. *n.*

III. *In Judgments.*

1. In the case of executors, if the clerk enter judgment *de bonis propriis*, instead of *de bonis testatoris*, and error is brought, this court will order the entry to be amended, even if the record is sent back from the Exchequer Chamber.

Green v. *Rennet.* 1 T. R. 783

2. Where an executor pleads *plenè administravit*, and the plaintiff does not take issue on it, but takes a judgment of assets *quando acciderunt*; if the executor receive assets between the time of the plaintiff's suing out the writ and the judgment, in a *scire facias* on such judgment, the court will permit the plaintiff to amend his judgment as to the time, by making it a

judgment as of that term when he could at the soonest have entered it up; unless the defendant can shew that in point of fact some injustice will be done by it in the particular case.

Mara v. *Quin.* 6 T. R. 1

3. Where the defendant in replevin made cognizance for rent in arrear, and the jury found a verdict for him, and damages to the amount of the rent claimed in his cognizance, *without finding either the amount of the rent in arrear, or the value of the cattle distrained,* and judgment was entered for the damages assessed, the court permitted the defendant to amend his judgment, and to enter a judgment *pro retorno habendo, after a writ of error brought.*

Rees v. *Morgan.* 3 T. R. 349

IV. *In intermediate Proceedings.*

1. An information filed by the Attorney General against an *East India* delinquent, under 24 *G.* 3. *c.* 25. and 26 *G.* 3. *c.* 57. to which the defendant demurs, may be amended in *B. R.* upon the motion of the Attorney General. *R.* v. *Holland.* 4 T. R. 457

2. Amendments upon informations are now so much a matter of course, that they are made on an application to a judge at chambers. 4 T. R. 458

3. The court will not amend a *mandamus* after a return has been made to it. *R.* v. *The Mayor, &c. of Stafford.* 4 T. R. 689

4. In certain cases the court will permit an amendment to be made in a notice at the bottom of a declaration in ejectment. *Doe d. Bass* v. *Roe.* 7 T. R. 469

5. Misnomer in the bail-piece amended in C. P.

Anderson v. *Noah.* 1 B. & P. 31

6. One obligee in a joint bond having sued out a capias against the obligor, and taken a recognizance of bail in his own name only, afterwards sued out an *original* in the name of both obligors, and then applied to the court to amend both the *capias* and recognizance; the court granted the former, but refused the latter.

Tabrum v. *Tenant.* 1 B. & P. 481

7. Leave given to amend the declaration by entitling it of the day on which it was actually delivered, instead of the term generally, in order to accord with an averment therein, that other defendants named in the writ were then outlawed.

Coutanche v. *Le Ruez.* 1 E. R. 133

8. The court refused to allow the amendment of a declaration in *scire facias,* against bail who had failed to surrender their principal (then in custody) before the quarto die post of the second writ. *Stevenson* v. *Grant.* 2 N. R. 103

9. It is not of course to amend in a writ of right: the demandant ought to make out a case by affidavit.

Dumsday v. *Hughes.* 3 B. & P. 453

10. The court refused to allow the demandant in a writ of right to amend the mistake of a christian name in the count, though an affidavit accounting for the mistake was produced: or to discontinue the suit.

Charlwood v. *Morgan & Ux.* 1 N. R. 64

11. In *Dumsday* v. *Hughes* the court thought that writs of right ought not to be encouraged: that the least slip was fatal to the demandant; and that it was only *possible* a case might be brought before them which they should think a fit one for an amendment.

1 N. R. 66

V. *In Records, &c.*

1. A bill of *Middlesex,* filed of record as of the 24 *G.* 3. when it ought to have been of the 25th, may be amended agreeable to the truth.

Green v. *Rennet.* 1 T. R. 782

2. The principal circumstance the court looks to in such cases is to see whether there is any document to amend by.

1 T. R. 783

3. Defendant pleaded the general issue and the statute of Limitations; a verdict was found for the plaintiff on the first issue, and no notice taken of the last; after error brought and joinder in error (which was assigned on this point), the court allowed it to be amended by the judge's notes, on payment of costs.

Petrie v. *Hannay* 3 T. R. 659

4. In an action on the statute of usury for taking more than legal interest on a loan of money "from the 15th of *April* to the 14th of *July,* 1802," the court will amend the verdict by the judge's notes, if the jury by mistaking the date of an instrument create a variance in their special finding, for which the evidence affords no foundation.

Manners q. t. v. *Postan.* 3 B. & P. 343

5. If to a rejoinder concluding with a verification, the plaintiff add the *similiter* and take the record down to trial, and the defendant obtain a verdict, the court will not grant a new trial, but will amend the record.

Grundy v. *Mell.* 1 N. R. 28

6. The Court (of C. P.) said that they could not alter a verdict unless it appeared clearly on the face of it, that the alteration would be according to the intention of the jury.

Spencer v. *Goter.* 1 H. B. 78

7. Where a general verdict was given on two counts, one of which was bad, and it appeared by the judge's notes, that the jury calculated the damages, on evidence applicable to the good count only: the Court (of C. P.) amended the verdict, by entering it on that count, though evidence was given applicable to the bad count also.

Williams v. *Breedon.* 1 B. & P. 329

8. Where a verdict is given for a greater sum than the amount of the damages laid in the declaration, and for that cause a writ of error is brought, the court will permit the plaintiff to enter a *remittitur* of the excess above the sum laid in the declaration, on payment of the costs of the writ of error.

Pickwood v. *Wright.* 1 H. B. 643

9. The *postea* may be amended by the judge's notes at *any* time, even after final judgment and a writ of error brought.

Doe d. Church v. *Perkins.* 3 T. R. 749

10. The court will give leave to amend a record by inserting a special memorandum of the day when the plaintiff's bill was filed after a writ of error brought, but no such alteration can be made without leave of the court, though by consent of the other party.

Dickinson v. *Plaisted.* 7 T. R. 474

11. Where in a plea by an executor of a former judgment recovered, by mistake a less sum is stated than the judgment was really for, if it clearly appear that a greater sum was recovered, the court will permit the defendant to *amend* the *record* by inserting the real sum in the plea, though the application be not made for the amendment till a considerable time (*ex. gr.* near three years) after the record has been made up: but in such case they will allow the plaintiff to reply *per fraudem*. *Skutt* v. *Woodward (executrix).* 1 H. B. 328

12. The Court (of C. P.) will not grant leave to amend a Recovery on affidavit only; it must appear on the face of the deed, to lead the uses that there is sufficient ground for an amendment.

Pearson D. *Pearson* T. & *Brougham* V. 1 H. B. 73

13. That court will give leave to amend (by the deed to lead the uses) a mistake in the writ of entry in a recovery.

Cross D. *Grey* T. & *Pead & al.* V. 1 B. & P. 137

14. The court amended a Recovery by inserting a new parish in the writ of entry, upon an affidavit of the original intent of the parties to include all their property within the county, and of the assent of all persons interested at the time of the amendment. *Wheeler* D. *Hill* T. *& Heseltine & al.* V. 2 B. & P. 560

15. A writ, and the subsequent proceedings in a recovery, were amended by inserting the words, "all and all manner of tithes whatsoever yearly arising, &c. from and out of the said premises," on an affidavit, setting out the vouchee's title to the tithes, and stating his intention to have passed all his interest in the premises, the word "hereditaments" being contained in the deed to lead the uses. *Dowse* D. *Lloyd* T. *& Reeve* V. 2 B. & P. 578

16. On the 23d June 12 *G.* 3. a recovery suffered on the 2d Oct. 11 *G.* 1. of the manor or deanery of *Chester le Street*, with its members and appurtenances, 30 messuages, &c. and 400 acres of moor, was amended by inserting, in the writ of entry and subsequent proceedings, after the words "quadraginta acras moræ," the words "ac etiam advocationem, presentationem, donationem, nominationem, liberam dispositionem, et jus patronatus ecclesiæ de Chester le Street, ac etiam advocationem, &c. de curatione de Chester le Street," the word "hereditaments" being contained in the deed to lead the uses, and the intention to pass the advowson with the rest of the premises appearing, although the amendment was contested. *Milbank* v. *Joliffe*, Court of Pleas at *Durham*, 23d *June*, 12 *G.* 3. 2 B. & P. 580 *n.*

17. Upon affidavit of the facts, the court allowed a Recovery to be amended by inserting certain messuages, &c. which were omitted by mistake: and also permitted the indenture to lead the uses to be amended by inserting the entireties of certain premises named in the indenture as moieties only, all the conveying parties being alive and consenting, and all the premises lying within the same county.

Kinderley D. *Domville* T. &c. 1 W. P. T. 257

But the court would not permit a

recovery of lands, &c. lying in two different parishes to be amended by inserting one of the parishes not named in the deed to make a tenant to the precipe, although it appeared that the parish was named in the instructions for the deed and had been inadvertently omitted, and that the lands in that parish were part of the estate of an ancestor whose estate was intended to pass. *Clutterbuck* D. *Debary* T. 2 W. P. T. 96

18. The court permitted a Recovery suffered of manors to be amended by the insertion of messuages originally parcel of the manor but severed by a settlement and omitted to be named in the recovery: the vouchee being tenant in tail, still alive, and the messuages being originally intended to pass.

Carew vouchee. 1 W. P. T. 355

19. The court will not amend a recovery by inserting the name of the husband of a vouchee who is a femme covert.

Parsons D. *Abbot* T. &c. 2 N. R. 478

20. The court allowed a recovery to be amended by inserting a rent charge which had long been treated as merged in the land by unity of possession.

Brett D. *Smith* T. &c. 1 W. P. T. 284

21. A Recovery of *Hil.* 17 *G.* 3. was allowed to be amended by inserting the words "Tithes," it being sworn to have been only recently discovered that the devisor at the time of the execution of the deed to lead the uses was entitled to the tithes.

Cordon D. *Hall* T. &c. 2 N. R. 431

22. The court refused ,to amend a Fine passed two years back by altering the surnames of the Deforciants, though it was sworn that a wrong name had been inserted by mistake.

Ex porte Motley et Ux. 2 B. & P. 455

23. The court permitted a fine to be amended by inserting the name of a parish in which part of the premises lay, upon its appearing from the deed to lead the uses that these premises were intended to pass.

Gladwin v. *Brown.* 2 W. P. T. 1

24. If one of the deeds to lead the uses of a Fine, *viz.* the lease, contain the word "tithes," but the other deed, *viz.* the release, omit that word, the court will not amend the writ of entry by inserting the word "tithes," though the release has the words, "and also all houses, ways, &c, hereditaments and appurtenances whatsoever, to the said messuages, lands, &c. belonging, or in any way appertaining."

Phillips v. *Jones.* 2 B. & P. 362

See 2 N. R. 431

AMERCEMENT.

An amercement at a court-leet for a private injury to the lord is illegal, though there be a custom to warrant it. *Wood* v. *Lovatt.* 6 T. R. 511

AMERICA.

Under the treaty of amity, commerce, and navigation between *Great Britain* and the United States of *America*, confirmed by stat. 37 *G.* 3. *c.* 97. (see § 22, 23, of that act, and also 37 *G.* 3. *c.* 117.) it is not necessary that the trade from *America* to the *British* settlements in the *East Indies* should be direct, it may be carried on circuitously by the way of *Europe*, and of *Great Britain* in particular.

Wilson v. *Marryat.* 8 T. R. 31. Affirmed in *Cam. Scac.* 1 B. & P. 430.)

ANNUITY.

I. *Consideration of; what shall be good.*

1. Bank-notes are money within the annuity act, 17 *G.* 3. *c.* 16. and may be described as such in the memorial

Wright v. *Reed.* 3 T. R. 554

Cousins v. *Thompson.* 6 T. R. 335

See *Rumball* v. *Murray. post*, V. 2.

2. If a bond and warrant of attorney to confess a judgment be given to secure an annuity, the warrant of attorney need not express the consideration, if the bond do.

Hodges v. *Money.* 4 T. R. 500

3. Where 1200*l.* had been paid for the grant of an annuity, and the securities to prevent their being registered had been renewed from 20 days to 20 days, and then 600*l.* had been paid for the grant of a further annuity, and the securities renewed in like manner, and sometimes after a longer period than 20 days, and afterwards had been registered; a memorial of the annuity, stating the consideration to be 1800*l.* was deemed valid.

Symmons v. *Mortimer.* 5 T. R, 139

4. So where the consideration of an annuity was stated in the memorial to be 640*l.*, 105*l.* of which was paid in money by the grantee to the grantors at the time, and the remaining 535*l.* was paid by the grantee at the desire

of the grantors to another person, to redeem a former annuity granted by them, for which only 480*l.* was paid, this was held a sufficient consideration within the act.

Ex parte Fallon & Wise. 5 T. R. 283

5. A solicitor, who advances his own money on the purchase of an annuity, is not intitled to any commission fee: and if any part of the consideration money be returned to him by the grantor, as a charge for such commission, the court will set aside the annuity deeds.

Broomhead v. *Eyre.* 5 T. R. 597

6. Money lent and paid at different times, for the education and advancement of the defendant, is a good consideration under § 3. of the act.

Kelfe v. *Ambrosse.* 7 T. R. 551

7. Such a consideration is sufficiently expressed, in the deeds for securing the annuity, under the description of money lent and advanced, and also paid, laid out, and expended, to and for the maintenance, education, and advancement in the world, of the defendant." 7 T. R. 551

II. *Deeds granting, in what Cases void:* (and see *post*, Div. IV. V.)

1. An annuity deed, and every deed, &c. by which an annuity is secured, is *absolutely void*, and not merely voidable, if the memorial be not registered according to the directions of the act. *Crossley* v. *Arkwright.* 2 T. R. 603; and a creditor of the grantor may take advantage of it. 5 T. R. 9

2. If several deeds be given to secure an annuity, and one of them be not properly registered, quere if all of them be not void by the annuity act? *Hart* v. *Lovelace.* 6 T. R. 471. See *Hopkins* v. *Waller.* 4 T. R. 463; that a memorial of a warrant of attorney must be registered, and Lord *Kenyon*'s opinion there. But see *ex parte Chester.* 4 T. R. 694. *post*, V. VI. and 1 B. & P. 66 *n.*

3. If the memorial of a deed to secure an annuity be defective, the whole deed is void to all intents, even though there are other parts of it not connected with the annuity. *Denn d. Dolman* v. *Dolman.* 5 T. R. 641

4. Where a person, against whom a writ of *fi. fa.* is taken out, is in possession of goods under a deed which was given in consideration of an antecedent debt, and a small annuity payable therefrom, the sheriff is warranted in returning *nulla bona* if the memorial of the annuity be not registered. 2 T.R.603

5. The memorial stated a deed poll, by which (after recitiug that *A.* had formerly granted an annuity of 24*l.* to *B.*, who had assigned to *C.*, and that *A.* had agreed to grant a further annuity of 7*l.* to *C.* for 42*l.*) certain tithes, &c. were assigned by *A.* to *C.*; and also a bond by *A.* to *C.* in 400*l.*; for securing "one annuity of 31*l.*" without reference to the deed-poll: held that the consideration for the annuity secured by the bond should have been stated, and that for want of it the bond was void; the annuity mentioned in it not appearing to be the same annuity as that secured by the deed-poll.

Saunders v. *Hardinge.* 5 T. R. 9

6. If it be set forth in the memorial that the consideration was so much in money paid, when the real consideration was part in money and the giving up of a former annuity, the court will set aside the securities.

Washburn v. *Birch.* 5 T. R. 472

7. So if part of the consideration be paid over by the grantee to a third person, with the consent of the grantor, or is accounted for to the grantor by a note from a third person, and it is stated in the memorial that the whole consideration was paid in money, the court will set aside the annuity deeds.

Watts v. *Millard* 5 T. R. 598

8. It is no objection to a deed securing an annuity, that it assigns "the salary of the grantor of so much *per an.*" without saying what salary it is.

5 T. R. 598

9. An annuity being secured upon land expressed to be of equal or greater annual value, the court before they will set aside, upon the inferiority of the value of the land, a warrant of attorney given as a collateral security, will direct an issue to try the value of the land, and will not try that matter upon affidavits.

Saunders v. *Wright.* 1 W. P. T. 369

III. *Forfeiture of.*

1. *A.* by will gave an annuity to *B.*, directing that *B.*'s receipt only should be a discharge for it, that *B.* should not alienate, and that if he did, it should cease and determine? *B.* be-

came a bankrupt, and his commissioners assigned the annuity with his other effects to the assignees; it was held that the annuity ceased.

Dommett v. *Bedford.* 6. T. R. 684

2. An annuity being granted in consideration of a debt before secured by bond, the grantee's refusing to deliver up the bond, is not such keeping back of part of the consideration as to vacate the annuity.

Cook & Cheek v. *Tower.* 1 W.P.T. 372

3 And where an annuity was granted in consideration of a bill accepted, which was dishonoured by the acceptor but paid by the drawer on notice; this was not such a non-payment of the bill as to vacate the annuity, though it was accepted for the accommodation of the drawer, who undertook to provide for the payment of it, but neglected so to do. *Id. Ibid.*

IV. *Registry; what Annuities must be registered, under stat.* 17 *G.* 3. *c.* 26., *and when:* (see *ante*, II. *& post*, V.)

1. If an annuity be granted in consideration of the grantee's giving up his business to the grantor, it need not be registered. *Crespigney* v. *Wittenoom* 4 T. R. 790. *Horn* v. *Horn.* 7 E. R. 529

2. Nor does it make any difference if part of the consideration be book debts and stock in trade. *Doe. d. Johnston*, v. *Phillips.* 1 W.P. T. 356

3. Those annuities only, which are granted in consideration of something paid, need be registered. 4 T. R. 722

4. An annuity granted in consideration of the grantee resigning his situation, as master of an academy, in favour of the grantor, need not be registered, even though at the time of the grant the grantee agreed to assign over to the grantor his household furniture, &c. at an appraised value, and to lend a sum of money to the grantor to be repaid with interest.

Hutton v. *Lewis.* 5 T. R. 639

5. An annuity secured on lands in fee of equal annual value need not be registered though it were also secured upon leasehold property.

Ex parte Michell. 2 E. R. 137

6. *A.* who was tenant for life, with remainder to trustees, &c. remainder to his first and other sons in tail, remainder to himself in fee, suffered a recovery with *B.* his only son, and declared the uses to such person, and for such estates, &c. as they should jointly appoint; they jointly granted an annuity, and appointed and granted the lands to *C.* for a term of years in trust for the grantee: held that this case came within the exception of the act.

Holsey v. *Hales*, Bart. 7 T. R. 194

7. The 8th sect. of the act, which excepts annuities secured by the transfer of stock, only extends to those cases where an actual transfer of the stock is made for the purpose of securing the annuity. 6 T. R. 596

8. Therefore if *A.*, who is entitled for life to the dividends in certain stock standing in the names of trustees, grant an annuity to *B.* payable out of the dividends, and empower those trustees to pay *B.* the annuity must be registered.

Hudson v. *Skinner.* 6 T. R. 596

9. An annuity granted by one who was mortgagor in fee in possession of lands on which it was secured, of greater annual value than the interest of the mortgage, and the annuity is within the exception of § 8. of the Annuity Act, as a grant of an annuity by one who was *seized in fee simple;* and therefore no memorial of it need be enrolled: the *seisin in fee* then excepted extending by parity of reasoning to *equitable* as well as *legal* estates.

Amhurst v. *Skynner.* 12 E. R. 263

10. An annuity granted by *A.* to *B.*, and which was regularly registered, was redeemed by virtue of a clause of redemption in the deed, when the deeds were delivered up to the grantor uncancelled; and he and the attorney for the grantee agreed, that if at any future time the former should wish to borrow money on the same terms, those deeds should be given as a security: on a subsequent application by the grantor, the attorney advanced the same money on having the same deeds delivered to him; but because this regrant of the annuity was not registered, the court set aside the annuity, and ordered the deeds to be cancelled, &c.

Hammond v. *Foster.* 5 T. R. 635

11. *A.* grants an annuity to *B.*, the whole of which *B.* assigns to *C.* There being a memorial enrolled of all the original securities it is not necessary that there should be also one of the assignment *Dixon* v. *Birch.* 2 H. B. 307. & *Bromley* v. *Greathead*, K.B. *H.* 34. *G.* 3. 2 H. B. 307. *n.*

12. The first section of the act, requiring the deeds to be enrolled within 20 days of the execution, &c. means 20 days exclusive of the day of execution. 5 T. R. 285

V. *Memorial for registering; Requisites of;* (and see *ante*, II.)

1. The memorial must set forth precisely the manner in which the consideration money was paid.
Kirkman v. *Price.* 1 H. B. 309
(See *ante*, I.)

2. If the consideration of an annuity be paid in promissory notes, they must be specifically set forth in the memorial.
Rumball v. *Murray.* 3 T. R. 298

3. So if paid in *country* bank notes.
Morrie v. *Wall.* 1 B. & P. 208
(But see the opinion of *Eyre*, J. C. and *ante*, I. 1.)

4. If the consideration of an annuity be paid by a note or a banker's check, the time when it becomes payeble must be set forth in the memorial.
Berry v. *Bentley.* 6 T. R. 690
Pool v. *Cabanes.* 8 T. R. 328

5. But it may be stated as money if the value has been received by the grantor of the annuity before the execution of the deeds. *Ex parte Michell Cl.* 2 E. R. 137

6. If the consideration money of an annuity be paid by an agent on behalf the principal, it must be so stated *in the deed;* it is not sufficient to state that it was paid by the principal.
Dalmar v. *Barnard.* 7 T. R. 248

7. So if it be paid by the clerk of the bankers of the grantee, the name of such clerk ought to be stated in the deed. *Askew* v. *Makreth.* K. B. affirmed in *Dom. Proc.* N. R. 214

8. Nor is it sufficient if the mode of payment be truly stated in the *memorial.*
Glasse v. *Mount.* and 7 T. R. 390
and see 1 B. & P. 63 *n.*

9. A memorial stating that the consideration money was paid to *A.*, *B.*, and *C.*, "some or one of them," is bad; though it appear that the money was paid on the day on which the deed was executed by them all.
Vaux v. *Ansell.* 1 B. & P. 224

10. A bond to secure an annuity set forth in the memorial, recited, that the consideration-money, 1400*l.*, was paid on the 24th of *December*, when all the deeds except one were executed and bore date; and the memorial also contained a specific allegation that the consideration-money was paid, but without stating any particular time; but, in fact, that one deed not having been executed by one of the grantors, the grantee delivered over the consideration-money on that day to another of the grantors, to be by him lodged in a banker's hands, in the names of himself and the grantee's attorney till that deed was executed; and such deed was not in fact executed, nor the money actually available to the grantors till the 26th of the same month: held, that this was a substantial compliance with the annuity act, the time of payment of the consideration-money not being specifically required to be stated by that act, nor being any otherwise material than as entering into the question of the value of the consideration. And held, that upon an issue taken (in an action of debt on bond) in general terms, without reference to the annuity act, upon a traverse that the consideration-money was not paid *by the grantee* to the use of the grantors, evidence that it was so paid on the 26th *by the grantee's agent* will sustain the affirmative of the issue so generally framed. *Coare* v. *Giblett.* 4 E. R. 85

11. So where the consideration for an annuity was alledged in the deed to have been paid by the grantee on a particular day, on which day it was paid to the common agent of both parties who were at a distance from each other, and by him paid over in a few days afterwards to the grantor on his executing the deed; this was held a sufficient allegation of payment within the statute; for a payment to the agent of the principal, is a payment in law to such principal.
Crawfurd v. *Phillips.* 2 N. R. 141

12. It is sufficient to state the true consideration for the purchase of the annuity in the memorial by way of recital.
Sowerby v. *Harris.* 4 T. R. 494
Hodges v. *Money.* 4 T. R. 500
Cousins v. *Thompson.* 6 T. R. 335

13. The first part of a memorial stating a bond, by which certain persons *become bound* to the grantee, may be explained by a subsequent part setting forth another bond, in which the first is recited as a *joint and several* bond; such recital not being inconsistent with the preceding allegation, but only explaining what was before left short in the description of the first bond.
Coare v. *Giblett.* 3 E. R. 461

14. But where a bond and warrant of attorney given to secure an annuity were no otherwise noticed in the memorial than by way of recital in the annuity deed, which was set out; the Court of C. P. held this insufficient.
Van Braam v. *Isaacs,* 1 B. & P. 451

5. If several deeds be given to secure an annuity, and the consideration be expressed in all, the memorial need only state the consideration once.

Hodges v. *Mouey.* 4 T. R. 500

16. A consideration of 10*s.* paid to a trustee need not be set forth in the memorial, as part of the consideration. *Inee* v. *Everard.* 6 T. R. 545

17. Nor that an annuity was payable for the portion of time from the last quarter day to the death of the annuitant. 6 T. R. 545

18. If it be agreed by the grantor and grantee of an annuity that the former shall pay the expenses of the writings, and he, immediately after receiving the consideration-money, pay the fair charges of the writings out of that money; no notice need be taken of it in the memorial, but it may be there stated, that the whole consideration-money was paid to the grantor.

Mouys v. *Leake & al.* 8 T. R. 411

19. Where a warrant of attorney has been given to confess a judgment, to secure an annuity, together with other securities the memorial must state the warrant of attorney, as well as the other securities.

Davidson v. *Lord Foley.* 2 H. B. 12

Hopkins v. *Walker.* 4 T. R. 463

20. In this respect there is no difference, whether the annuity were granted before or after the passing of the annuity act. 4 T. R. 463. 2 H. B. 12

21. If a bond and warrant of attorney to confess a judgment be given to secure an annuity, the judgment need not be inserted in the memorial, though it be entered up before the memorial is registered. *Sherson* v. *Oxlade.* 4 T. R. 824

22. For the bond and warrant of attorney are the securities on which the grantee relies. 4 T. R. 824

23. But if the only security be a judgment actually entered up, that must be registered. 4 T. R. 825

23. A memorandum indorsed on an annuity deed, importing that the grantor for whose life it is granted may redeem it on certain terms, must be inserted in the memorial.

Steadman v. *Purchase.* 6 T. R. 737

So a clause of redemption in the deed.

Harris v. *Stapleton.* 7 T. R. 205

25. So where a memorial of an annuity omitted to register certain bonds, whereby the grantor for whose life the annuity was granted bound himself to pay the grantee a certain sum if he went abroad in a military capacity during three several years following the grant of the annuity: held, that the annuity was thereby vacated; and the court thereupon set aside the warrant of attorney and judgment given for securing the annuity; but said it belonged to another court to set aside the other instruments executed for the same purpose. *Chawner* v. *Whaley.* 3 E. R. 500

(See *post*, VI. 2. &c.)

26. A bond given by a third person to secure the payment of an annuity must be registered, as well as the deeds made by the grantor himself.

Rosher v. *Hurdis,* 5 T. R. 678

27. If the memorial only refer to the deed, and state the annuity to be redeemable, "on such notice, terms, and conditions as therein expressed," it is insufficient.

Ex parte Ansell & al. 1 B. & P. 62

28. So if it only state the time at which execution may be sued out by words of reference to the deed.

Orton v. *Knight.* 3 B. & P. 153

29. The memorial ought to state the names of the witnesses to the respective instruments by which the annuity is secured; stating that *all* the instruments were attested by *A.*, *B.*, and *C.*, *or one of them*, is not sufficient.

Hart v. *Lovelace.* 6 T. R. 471

30. And if it state that they were attested by *A.*, *B.*, *C.*, and *D.*, that must be taken to mean that each of them was so attested.

Ex parte Mackreth. 2 E. R. 563

31. But if the memorial of an annuity deed between *A.*, *B.*, and *C.*, after describing the parties to the deed and the contents, state that it was executed by *A.* and *C.*, in the presence of *E.* and *F.*, it will be no objection that *B.* also executed it in the presence of the same parties. For it is sufficient if the memorial state all the subscribing witnesses without specifying what signatures they respectively attested.

Orton v. *Knight.* 3 B. & P. 153

32. But where several deeds were executed to secure one annuity, and the christian name of the witness to one of the deeds was omitted in the memorial, the Court refused to set aside the deeds.

Watts v. *Millard.* 5 T. R. 598

33. The memorial stated the annuity deed to have been executed on the *trusts therein mentioned*, and on further trust, that if any of the payments should be in arrear 20 days after becoming due the grantee might levy them out of t

rents: the grantor moved to set aside the annuity, because the memorial did not disclose the trusts referred to; but it appearing by an affidavit of the grantee that he bought the annuity for himself, and *that there were no other trusts but that expressed*, the Court held the memorial to be sufficient.

Toldervy v. *Allan.* 5 T. R. 480

34. The legislature only meant to require the parties to set forth the trusts created for or in consequence of the annuity, not those which are a lien on the estate independently of the annuity; as those to pay taxes, *&c.* 5 T.R. 481

35. In a subsequent case, an annuity deed was set aside for two defects in the memorial; 1st, because the memorial only stated that part of the consideration was paid by the grantee to the trustee "in trust, and for the purposes therein mentioned," without disclosing those trusts; 2dly, because the memorial only set forth that the demise was made by the grantor to a trustee "upon the trusts therein mentioned," without saying what the trusts were.

Denn d. Dolman v. *Dolman.* 5 T.R. 641

36. Certain premises were conveyed by deed to a trustee to secure an annuity in trust if the annuity should be in arrear sixty days, by lease, sale or, mortgage, to raise the arrears, and permit the person entitled to the freehold to receive the rents and profits of the residue; and he was created a trustee for the grantee till default of payment. The memorial described him to be "a trustee nominated on the part of the grantee," without stating any of the trusts; held to be an insufficient description.

Askew v. *Macknreth.* K. B. affirmed *in Dom. Proc.* 1 N R. 214

37. Where tenant for life conveyed estates to trustees, in trust to raise money by grant of annuities for his life, and such conveyance is recited in a deed for granting an annuity accordingly, it is not necessary to enroll a memorial of the first trust deed. *O'Callaghan* v. *Ingilby.* 9 E.R. 35

It is not necessary that the estates charged with an annuity should be specifically set forth in the memorial, where the annuity is charged on all the grantee's estate in a certain county, and so stated: nor is it necessary to state specifically the powers in a deed except to far as they create a trustee; which brings them within the clauses of the statute relating to trustees. *Id. Ib.*

38. A deed for securing an annuity containing a stipulation that the trustee should permit the grantor to take the rents and profits untill default in the payment of the annuity, and that *in case the annuity should be in arrear for sixty days*, the trustees might enter and raise sufficient to satisfy it, and suffer the grantor to take the overplus from time to time, is not satisfied by a memorial only describing such deed as containing *the usual powers of entry and distress*, and perception of the rents and profits of the premises, for better securing and enforcing the payment of the annuity.

Des Enfans v. *O'Bryen.* 3 E. R. 559

39. If in the deed securing an annuity, it be declared that the judgment, to be obtained under a warrant of attorney given at the same time, shall be only a collateral security for the regular payment of the annuity, and that no execution shall issue thereon till default made in the payment for 14 days; and the memorial, in setting forth the warrant of attorney, only states generally, that "it was executed for the better securing the payment of the annuity, as in the above stated deed is particularly mentioned," the court will set aside the annuity.

Cunningham v. *Mackenzie* 2 R.&P. 598

40. A memorial, stating that *A.* and *B. severally* became bound, is not sufficient if the bond be *joint*, as well as *several.*

Willey v. *Cawthorne.* 1 E. R. 398

41. A memorial of an annuity bond is bad for want of stating that the obligor became bound "*himself, his heirs, executors, and administrators,*" which words were in the body of the bond: for such a memorial does not truly describe the *extent* of the security.

Horwood v. *Underhill.* 10 E. R. 123

42. Where the same point was decided, the court refused to direct the warrant of attorney to be delivered up to be cancelled, but ordered it to be delivered into the custody of the proper officer of the court.

Denne v. *Dupuis.* 11 E. R. 34.

43. At the time of executing an annuity deed, one *R. W.* the agent of *I. C.*, the grantee, entered into an agreement for redemption, beginning thus: "Memorandum, I undertake and agree," *&c.* and concluding, "Witness my hand, *R. W.* agent for *I. C.*; the memorial stated that *I. C.* entered into the agreement by *R. W.* his agent,

and that it was witnessed by *R. W.*; held, that the memorial was sufficient.
Cator v. *Hoste.* 2 B. & P. 557

44. In a conveyance of a life interest in an estate, to a trustee in trust for securing an annuity, it was first stipulated that the trustee should permit the grantor to receive the rents and profits until default made in the payment of the annuity, and then in trust for the grantee; the memorial of the annuity stated the trust to be for the grantee generally, which was holden ill. *Taylor* v. *Johnson.* 8 T. R. 184

45. An annuity was set aside, because one of the trusts (*viz.* that in case the grantor should leave the kingdom, he should pay any extra expense of the grantee in insuring his life) was not stated in the memorial.
Cummins v. *Isaac.* 8 T. R. 183

46. In the memorial of a grant of an annuity by a rector out of his benefice, and which grant, though voidable, is not set aside by the court on the ground of a covenant by the grantor to pay the annuity; it is not necessary to set out this covenant. 8 T. R. 411

VI. *Relief; Mode of granting by the Courts.*

1. Where a rule *nisi* is obtained in *B. R.* for setting aside an annuity, the several objections thereto intended to be insisted on by counsel at the time of making the rule absolute must be stated in the rule *nisi*.
Reg. gen. T. 42 *G.* 3. 2 E. R. 599

2. Whether the court have a summary jurisdiction under § 4. to set aside annuity deeds, *&c.* for objections arising on the first section of the act. *Qu.*
Steadman v. *Purchase.* 6 T. R. 738, 9 (See *ante*, V. 24).

3. The grantor of an annuity having assigned a lease for securing the payment of it, and afterwards sold his interest in the lease to a fair purchaser, it was held by the Court of K. B. that the latter was not entitled to apply to the court under the annuity act to have the security delivered up *to be cancelled*, on the ground of the memorial required by the act not having been duly registered.
Garrood v. *Sanders.* 6 T. R. 403

4. But the deed is void by § 1. of the act. 6 T. R. 403

5. The Court of C. P. refused to order an annuity bond to be delivered up *to be cancelled*, though it was void under § 1.—The motion should have been to stay proceedings. *Symonds & Ux.* v. *Cobourne.* 1 B. & P. 482
(See also 7 T. R. 253: 1 B. & P. 66, *n.*)

6. Where an action was brought by executors on a bond given by the defendant to their testator for securing an annuity, and upon a plea of *non est factum*, they obtained a verdict and judgment, and levied execution thereon, the court held that this was not a case where they could give relief upon a summary application for a defect in the memorial. *Buck and others, Executors of Buck,* v. *Tyte.* 7 T. R. 495

7. Where an ejectment was brought to recover possession of lands extended under an elegit upon a judgment confessed, which had been entered up upon a warrant of attorney given for securing an annuity, it is too late for the grantor to object to the consideration of such annuity, upon a summary application for staying the proceedings after verdict in such ejectment, because he had an opportunity of making his defence to the action.
Withy v. *Woolley.* 7 T. R. 540

8. Where several persons who had purchased annuities of *A.* agreed to give up these annuities on receiving a certain sum and a bond to *A.* payable at a future day, retaining their annuity securities till the bond became payable, the Court of C. P. refused to order any of such securities to be delivered up on a summary application, although they might be void or useless.
Goring, Bart. v *Welles.* 1 B. & P. 395

9. If a bond and warrant of attorney to confess a judgment be given to secure an annuity, and the date of the latter be not set forth in the memorial, the court will only set aside the latter.
Ex parte Chester. 4 T. R. 694

10. But this the Court of K. B. will do on motion, though no action be brought, or judgment entered up, under the warrant of attorney; *ib.* and
Thurkill v. *Wallace.* 4 T. R. 695, *n.*
(See 1 B. & P. 66. *n.*)

11. A fine levied of a rent charge assigned by way of annuity, will not give the Court of C. P. jurisdiction to set aside the annuity on account of a defective memorial, there being neither a warrant of attorney to enter, nor judgment actually entered in that court.
Craufurd v. *Caines.* 2 H. B. 438

12. Where upon a summary application to set aside an annuity for non-com-

pliance with the requisites of the act, the rule was discharged upon discussion of the merits, the court will not entertain a similar application between the same parties on the same state of facts, though grounded upon a new objection to the annuity, which was not before urged or considered.

Greathead v. *Bromley*. 7 T. R. 455

13. Where a former rule for setting aside an annuity was discharged, because it did not appear that an indorsement (not memorialized) containing a clause of redemption (bearing date after the deed) had been made prior to the execution of it; in which case it could not be received in evidence for want of being stamped; the court will not enter into the question on a subsequent rule; although it appear clearly that the indorsement was made before the deed was executed: and that such clause of redemption was not inserted in the memorial.

Schumann v. *Weatherhead*. 1 E. R. 537

14. The Court of C. P. set aside a judgment and warrant of attorney given to secure an annuity for a defect in the memorial, without costs, because it was the case of an executor.

Dickenson, Executor, &c. v. *Boyne*. 1 B. & P. 335

15. If the validity of an annuity has come in judgment before a court of competent jurisdiction, no other court will suffer the same objection to be stirred again. 6 T. R. 471 (But see 2 E. R. 566.)

16. *A.* grants an annuity for his own life to *B.*, to secure which a bond and warrant are given, and judgment entered; *B.* dies; *after his death* the court will not admit evidence of a parol agreement between the parties, that *A.* should be at liberty to redeem the annuity on certain terms (especially if it be the evidence of the attorney concerned for *B.*) as a ground to order the securities to be given up, and satisfaction entered on the judgment.

Haynes v. *Hare*. 1 H. B. 659

17. If the grantor of an annuity pay it without objection during the lifetime of the person who negotiated the business for the grantee, the Court of K. B. will not set aside the annuity deeds on a representation of facts that could only have been answered by such agent for the grantee.

Poole v. *Cabanes & al.* 8 T. R. 328

18. An annuity granted in 1790, the grantee of which died in 1794, and the interest of which was regularly paid till 1800 without objection, shall not be impeached for a supposed defect of consideration, which might have been explained by the grantee if living. And *semble* that an annuity paid without objection for more than six years shall be protected by analogy to the statute of limitations against any such objection *dehors* the memorial, without strong reasons to the contrary.

Ex parte Maxwell. 2 E. R. 85

19. But where the memorial of an annuity stated that "the instruments given to secure the annuity, were witnessed by four persons," and it appeared by the answer on oath of the *assignee of the grantee* that *three* of the instruments were attested by *two* persons only, the court on application, though at the distance of near twenty years, and after the principal parties and witnesses to the transaction were dead, set aside the warrant of attorney; the merits of such objection not depending on testimony lost by the delay. *Ex parte Mackreth*. 2 E. R. 563

20. So the Court of C. P. did not hold themselves precluded from interfering to give relief, though 18 years had elapsed since the grant of the annuity, and the grantee was dead.

Van Braam v. *Isaacs*. 1 B. & P. 454

21. Though perhaps the grant of a rent charge by a rector or vicar out of his benefice is void by *stat.* 13 *Eliz. c.* 20; yet if in such a deed of grant he also covenant personally to pay the said rent charge or annuity, and give a warrant of attorney to confess judgment as a collateral security for payment of the annuity, the court will not order the deeds to be delivered up to be cancelled.

Mouys v. *Leake, Cl. & al.* 8 T. R. 411

22. The court will not set aside annuity deeds for a mere clerical mistake in the memorial; as if, in stating the assignment of a term for 61 years, it set forth a term for 62 years.

Ince v. *Everard*. 6 T. R. 545

23. Or if, after reciting the true consideration, *e. g.* 280*l.* it state afterwards "which said sum of 250*l.* was paid," *&c.* 6 T. R. 545

24. The consideration of an annuity being partly a debt antecedently due for goods sold, and the residue thereof money paid at the time of granting it, the grantee may recover back in an

action for money had and received the whole consideration, if the annuity be set aside for informality in registering the memorial.

Shove v. *Webb.* 1 T. R. 732

25. But, if part of the consideration be for goods sold at the time of granting the annuity, *quære*, whether that can be recovered? 1 T. R. 732

26. Where an annuity bond, granted by two, becomes void by the neglect of the grantee in not registering the memorial, he cannot recover back any part of the consideration-money from the one, who was known to be only a surety for the other, and had not in truth received any part of it, notwithstanding they both joined in a receipt for it.

Straton v. *Rastall.* 2 T. R. 366

27. Where the grantee of an annuity, set aside for a defective registry, brings an action for money had and received, to recover back the consideration money paid for it, the grantor may, under a plea of set-off, set off the payments made in respect of such annuity, though for more than six years, unless the plaintiff reply the statute of limitations. *Hicks* v. *Hicks.* 3 E. R. 16

28. Where the grantor of an annuity secured by a deed, bond, and warrant of attorney, applied by motion to set aside the annuity, and have the securities cancelled, on account of an error in the memorial as to the description of the warrant of attorney; and the court did accordingly direct the warrant of attorney to be cancelled, and set aside a judgment entered up upon it; held that the guarantee might recover back the consideration-money in *assumpsit*, and was not put to his action on the deed or bond; because part of the securities being taken away, the consideration for the money, viz. one *entire* assurance, consisting of several securities, has failed.

Scurfield v. *Gowland.* 6 E. R. 241

APPEAL.

1. By stat. 17. *G.* 3. *c.* 106. an appeal is given on certain conditions from a conviction by a justice of the peace to any quarter sessions to be holden within six months from such conviction; if the appellant lodge his appeal, and the court dismiss it without entering into the merits, because the previous conditions have not been regularly complied with, and confirm the conviction, such judgment is conclusive, and the party cannot lodge a second appeal from the same conviction, though within the six months.

R. v. *the Justices of the West Riding of Yorkshire.* 3 T. R. 776

2. By an inclosing act an appeal was given to the next sessions within six months after the cause of complaint; an appellant moved the court of sessions in due time to receive *and respite his appeal to the next sessions*, which was refused; and this court would not grant a *mandamus* to the sessions to receive it. *R.* v. *the Justices of Derbyshire.* 4 T. R. 488

3. By 17 *G.* 3. *c.* 56. § 20. an appeal is given to the sessions against certain convictions, the party giving notice in writing to the justices convicting, and entering into a recognizance to try the appeal, *&c.*; and those justices are required to give notice to the party of his right to appeal; if those justices do inform him of such right, without saying any thing about the notice, and he enter into the recognizance, the sessions are bound to receive the appeal, though he did not give the notice in writing.

R. v. *the Justices of Leeds.* 4 T. R. 583

4. A person aggrieved by a distress for paving rates under 8 *G.* 3. *c.* 33 may appeal either to the sessions for the city of *London*, or to the sessions for *Middlesex*. *R.* v. *the Commissioners of Shoreditch.* 4 T. R. 701

5. No appeal lies to the quarter sessions against the allowance of the accounts of the surveyor of the highways, under stat. 13 *G.* 3. *c.* 78

R. v. *the Justices of the West Riding of Yorkshire.* 5 T. R. 628. and *R.* v. *M. Mitchell.* 5 T. R. 701

6. An appeal against a surcharge for the duties on servants, *&c.* must be preferred on the day appointed by the commissioners under stat. 25 *G.* 3. *c.* 43; and cannot be made after the expiration of the year within and for which the tax is to be collected.

R. v. *Walker.* 6 T. R. 433

7. A person aggrieved cannot appeal to the quarter sessions under the stat. 13 *G.* 3. *c.* 78. § 19. against an order of justices for turning a road, without giving ten days previous notice of the appeal, though he were not himself apprized of the order so long before

the sessions: but in that case he may give notice, and appeal to the following sessions. *R.* v. *the Justices of Staffordshire.* 7 T. R. 81

8. By that stat. the *appeal* is given to the party grieved by any "such order or proceeding, &c. at the *next quarter-sessions after such order made or proceeded had,* &c." held that at all events an appeal to the sessions next after the *actual obstruction* of the road was too late, the party having had sufficient notice of the order in time to have appealed to a preceding sessions. *R.* v. *the Justices of Pembrokeshire.* 2 E. R. 213

9. And it is now decided, that by the necessary construction of the statute, the appeal must be made to the quarter sessions *next after the order made,* without reference to any *notice* received by the appellant of such order. *R.* v. *the Justices of Staffordshire.* 3 E. R. 151

10. Upon an appeal to the sessions against an order of filiation, the respondents are to begin by supporting their orders as in all other cases.

R. v. *Knill.* 12 E. R. 50

See *R.* v. *Newbury (Inhab).* 4 T. R. 475

APPRENTICE.

1. An apprentice who at the age of 17 was bound by indenture (which stated her to be 14) for seven years, is entitled to be discharged at 21, being brought up by *habeas corpus.*

Ex parte M. A. Davis. 5 T. R. 715

2. The Court of K. B. refused to discharge an apprentice who had bound himself at 18 to serve till 25, and who after attaining 21 had been committed to the house of correction for a misdemeanor against his master; it appearing by the return that he was committed in execution upon a regular conviction; upon which conviction nothing appeared of the objection arising from the age of the apprentice.

Gill; ex parte. 7 E. R. 376

3. But the court said that such apprentice, having made such objection to the validity of the indentures before the convicting magistrates who disregarded it, has a remedy against them. *Id. ib.*

4. If an apprentice be impressed into the sea service, the *master* cannot sue out a *habeas corpus* to bring him up to be discharged, though the apprentice may. But the Lord Chief Justice may issue a warrant to bring him up, on the application either of the master or of the apprentice.

R. v. *Edwards.* 7 T. R. 745

5. And the master has also his remedy by action if his apprentice be improperly taken from him. 7 T. R. 745. 5 E. R. 39

6. The captain of a ship of war detaining an apprentice who had been impressed, after notice by such apprentice, is liable in an action by the master for wages for the service of the apprentice. *Eades* v. *Vandeput.* 5 E. R. 39, *n.*

7. The master of an apprentice who has been seduced from his service to work for another, may wave the tort, and bring indebitatus assumpsit for work and labour done by his apprentice, against the person who employed him.

Lightly v. *Clouston.* 1 W. P. T. 112

8. A contract under seal, and stamped, to serve another for three years, at so much per week, the master agreeing to learn the other a trade, and the latter agreeing, if he lost any time to the prejudice of his master, to abate so much per day, constitutes an apprenticeship.

R. v. *Rainham (Inhab.)* 1 E. R. 531

9. An apprentice in the Greenland fishery is no otherwise exempted from being impressed than under the general act of the 13 *G.* 2. *c.* 17. which exempts all persons from being impressed before the age of 18, and every person who not having before used the sea, shall bind himself apprentice to serve at sea for the first three years of such apprenticeship.

Ex parte Brocke. 6 E. R. 238

ARREST.

I. *Who are priviledge from, and in what Cases: and of Re-arrests.*

1. A femme covert was discharged out of custody, because she was arrested without her husband, though the writ was sued out against both, on which *non est inventus* was returned as to the husband. *Edwards* v. *Rourke et Ux.* 1 T. R. 468

2. A married woman holden to bail (for penalties incurred by insuring in the lottery) was discharged by the Court of C. P. on entering a common appearance, on her affidavit of her coverture.

Pritchett q. t. v. *Cross.* 2. H. B. 17

3. The court will not discharge a woman under arrest on common bail, as being married, if she obtained credit, pretending she was single.

Partridge v. *Clarke.* 5 T. R. 191

4. But if they will do so, if it appear that the plaintiff knew her to be covert at the time of contracting the debt.
Waters v. *Smith.* 6 T. R. 451
5. Or if she mistakenly allege she believes her husband to be dead.
Pitt v. *Thompson.* 1 E. R. 16
6. Or if the plaintiff knew she had a husband living abroad, though under terms of separation.
March v. *Capelli.* 1 E. R. 17, *n.*
7. A *Frenchwoman* and her husband, came over to *England;* the husband gives her a power of attorney to transact his business, and goes to *Hamburgh:* she cohabits with another man, and trades on her own account with the plaintiff, by whom she is arrested; under these circumstances the Court of C. P. refused *to discharge her on a common appearance,* on the ground of her coverture, although the plaintiff appeared to have been acquainted with it.
De Gaillon v. *L'Aigle.* 1 B. & P. 8
8. But that court will now discharge a *femme covert* defendant upon a common appearance, though she contracted the debt as a *femme sole,* and was trusted by the plaintiff as such, unless she represented herself to be single.
Collins v. *Rowed.* 1 N. R. 54
9. The court will not discharge a defendant out of custody on filing common bail, on the ground that he has become insane since the arrest.
Kernot v. *Norman.* 2 T. R. 390
10. Nor even on the ground that he was insane *at the time* of the arrest.
Nutt v. *Ferney.* 4 T. R. 121
11. And the Court of C. P. thought they could not, and accordingly refused to do it, though a commission of lunacy had issued against him previous to the arrest.
Steel v. *Alan.* 2 B. & P. 362
12. Neither will the court *discharge the bail* on the ground of the defendant's having become a lunatic since the commencement of the action.
Ibbotson v. *Lord Galway.* 6 T. R. 133
13. A secretary of a foreign minister is privileged from arrest, though his name be not registered at the office of the Secretary of State.
Hopkins v. *De Rosbeck.* 3 T. R. 79
14. One who had been appointed consul-general from the Porte, but who had been dismissed from his situation several months, and another person appointed to succeed him, is not privileged from arrest: though at the time of his arrest he had not received any official notification of his dismissal, and continued in fact to exercise his office till after his arrest. *Marshall* v. *Critico.* 9 E. R. 447: 1 W. P. T. 106
15. A person within the walls of a prison, though voluntarily, cannot be arrested by a creditor in the ordinary manner; but a detainer must be lodged against him. *Wilkinson* v. *Jaques.* 3 T. R. 392
16. The king's servants are privileged from arrest; and if taken in execution, the court will discharge them on motion. *Bartlett* v. *Hebbes.* 5 T. R. 686
17. An arrest within the king's palace, by an officer of the palace court, of a person not of the household, against whom a writ has issued out of that court, is good, though no leave to make the arrest has been obtained from the Board of Green Cloth; and no indictment will lie against the officers making it.
R. v. *Stobbs.* 3 T. R. 735
18. The court refused to discharge a person in custody by process of the sheriff's court, in a cause afterwards removed into this court, because he was arrested while attending commissioners of bankrupt to prove a debt.
Kinder v. *Williams.* 4 T. R. 377
19. The acceptor of a bill, which becomes due and is paid by him after the bankruptcy of the drawer, cannot arrest the drawer within the time allowed him by stat. 5. G. 2. c. 30. § 5; for attending the commissioners to be examined.
Darby v. *Baughan.* 5 T. R. 209.
20. The commissioners of bankrupt are a court of justice. 5 T. R. 299
21. If the bankrupt surrender within 42 days after notice, *&c.* the commissioners may by their own authority afterwards enlarge the time for taking his examination, during which enlarged time the bankrupt is privileged from arrest. *Davies* v. *Trotter.* 8 T. R. 475
22. A bankrupt attending upon notice for that purpose a meeting of the commissioners to declare a dividend of his estate, is protected from arrest at the suit of a creditor during such attendance, although several years after his last examination.
Arding v. *Flower & al.* 8 T. R. 534
23. The case of bail is an exception to the general rule. The principal is considered as being in the custody of the bail, who may surrender him when they please. 5 T. R. 209, 210

24. All persons who have a relation to a cause which calls for their attendance in court, whether they are compelled to attend by process or not, are entitled to privilege from arrest *eundo et redeundo* provided they come *bonâ fide*.
Meekins v. *Smith*. 1 H. B. 636
25. In which description *bail* is included.
1 H. B. 636
26. And *barristers* upon the circuit.
1 H. B. 636
27. So also a plaintiff, who was attending the sittings in expectation of his cause being tried, is privileged from arrest while waiting in the vicinity of the court before the day of trial.
Childerston v. *Barrett*. 11 E. R. 439
28. A defendant in a cause, attending an arbitrator to be examined as a witness under a rule of court, is privileged from arrest, *eundo, morando, et, redeundo*.
Spence v. *Stewart, Bart*. 3 E. R. 89
29. A volunteer drill-serjeant sworn and receiving constant pay, as described by 44 *G. 3. c.* 54. § 20, 21. is not privileged from arrest for a debt under 20*l*.
Rickman v. *Studwick*. 8 E. R. 10.
30. Defendant having given a bond conditioned for the payment of a sum of money if a sentence of a Vice Admiralty Court should be affirmed on appeal, and the appeal having been dismissed for want of prosecution, defendant was arrested and holden to bail; the appeal being restored upon petition, the action was suspended and the bail discharged; but being again dismissed, a new action on the bond was commenced, and the defendant was again arrested and holden to bail. From this second arrest the defendant applied to be discharged; but the court rejected the application.
Woodmeston v. *Scott*. 1 N. R. 13
31. *A.* having been arrested at the suit of *B.*, gave him a draft for part of the demand, and agreed to settle the remainder in a few days: the draft was dishonoured: on which B. again arrested him on the same affidavit; and it was held regular.
Puckford v. *Maxwell*. 6 T. R. 52
32. Plaintiff having recovered judgment and levied part under a *fi. fa.*, arrested the defendant for the residue in an action on the judgment, he not having been arrested in the original action; and the court refused to discharge him.
Hesse v. *Stevenson*. 1 N. R. 135
33. An attachment for non-payment of money to *A.*, having issued against *B.*, and the process being in the hands of an officer who had not been able to serve *B.* therewith, *B.* was met by *A.* in the street, and carried by violence to the chambers of *C.*, who was *A.*'s attorney, and there detained, while the original process was sent for and served upon him? the officer also was sent for (but not by *A.*), and on *B.*'s leaving the chambers of *C.* he was arrested. The court held this arrest illegal, and discharged *B.*
Birch v. *Prodger*, N. R. 135

II. *On Escape.*

1. It is a justification to the bailiff against an action of false imprisonment, that he retook a prisoner before the return of the writ on mesne process, though he had voluntarily permitted him to go at large after the first arrest.
Atkinson v. *Matteson*. 2 T. R. 172
2. After a voluntary escape, the sheriff cannot retake a prisoner.
Atkinson v. *Jameson*. 5 T. R. 25

III. *Fees on.*

Justices in sessions have no authority to fix the bailiff's fees for arrests in civil suits; nor will the Court of K. B. allow more than the usual fee of one guinea, though a larger sum has been in fact paid under the sanction of a table of fees settled by the sessions, and acted upon in practice for many years. *Boldero* v. *Mosse*. 3 T. R. 417

IV. *On Sunday.*

1. One who is convicted of a penalty under the lottery act, cannot be apprehended on a *Sunday* for non-payment of the forfeiture, it not being a constructive breach of the peace; though the defendant might have been indicted in a criminal manner on the act, in which case he might have been arrested on a *Sunday*.
R. v. *Myers*. 1 T. R. 265
2. So an attachment for non-performance of an award is only in the nature of a civil execution. 1 T. R. 266
3. So an attachment for non-payment of costs. *R.* v. *Stokes, Coup.* 136
4. A rule *nisi* for an attachment for non-payment of money pursuant to the master's *allocatur* cannot be served on a *Sunday*.
M'Ilham v. *Smith*. 8 T. R. 86

5. *A.* was arrested at the suit of *B.* and discharged, the sheriff not knowing that there was also a detainer in his office at the suit of *C.*: on the *Sunday* following he was arrested at *C.*'s suit, and discharged by the court, by virtue of stat. 29 *Car.* 2. *c.* 7. § 6. The arrest on the *Sunday* being considered as an original taking, and not as a retaking after an escape.

Atkinson v. *Jameson.* 5 T. R. 25

6. Where a writ is returnable on a *Sunday*, it must be executed at latest on the *Saturday:* and where a defendant in such case was arrested on the *Monday* morning, and detained till the writ was renewed, the arrest was held to be illegal. *Loveridge* v. *Plaistow.* 2 H.B.29 (And see *ante*, I. 29.)

V. *Warrant.*

1. A warrant of the Chief Justice of K. B. to arrest a party "to the end that he may become bound, *&c.* to appear at *the next session* of Oyer and Terminer, *&c.*" means the next session after the arrest, and not after the date of the warrant. Therefore the officer executing it may justify an arrest even after the lapse of several sessions subsequent to the date of the warrant. It is not necessary to renew such warrant every session if not executed before.

Mayhew v. *Parker & al.* 8 T. R. 110

2. An officer to whom a warrant is intended to be directed, cannot arrest the party before he has the warrant. If he do, the court will discharge the defendant out of custody.

Hall v. *Roche.* 8 T. R. 187

3. Whether the officer be not bound to produce the warrant to the party arrested if it be demanded? 8 T. R. 188

4. The bail-bond was ordered to be delivered up to be cancelled, because the defendant was arrested before the officer had any warrant, and before the writ was delivered to the sheriff.

Hall v. *Roche.* 8 T. R. 187

6. A sheriff's officer cannot justify an assault and false imprisonment of J. C. S. by shewing that a latitat issued against J. S. and averring that it issued against J. C. S. by the name of J. S., and that they are one and the same person; there being no averment that J. C. S. was known as well by the name of J. S.

Shadgett v. *Clipson.* 8 E. R. 328

ASSUMPSIT.

I. *General* Indebitatus Assumpsit.

1. The Law will not raise an assumpsit upon a judgment obtained by default in one of the colonies, against a party who upon the face of the proceedings appeared only to have been summoned by nailing up a copy of the declaration at the court-house door in the colony; it not appearing that he had ever been present in the colony, or subject to the jurisdiction of the colonial court, although by a law of the colony if the defendant be *absent* from the island such a mode of summoning shall be a good service; for such absence must be intended of one who once had been present and subject to the jurisdiction.

Buchannan v. *Rucker.* 9 E. R. 192

2. A general *indebitatus assumpsit* will lie for tolls.

Stewart v. *Baker.* 1 T. R. 616

3. Assumpsit may be maintained to recover back money paid upon a compromise, after another action has been brought for it by the defendant against the plaintiff, and an interlocutory judgment had, and a writ of inquiry executed thereon; it appearing afterwards that there was no real consideration for the first payment, and it having been made ultimately under a compromise, and not under the compulsory judgment of a court.

Cobden v. *Kendrick.* 4 T. R. 432

5. *A.* agreed with *B.* to let him land rent free on condition that *A.* should have a moiety of the crops; while the crop was on the ground it was appraised for both parties: *A.* declared in *indebitatus assumpsit* for a moiety of the value of the crop sold to *B.* without stating the special agreement; and held that he might well do so, as the special agreement was executed by the appraisement, and the action arose out of something collateral to it.

Poulter v. *Killingbeck.* 1 B. & P. 397

4. The plaintiff having submitted to arbitration certain matters between his principals (from whom he had a power of attorney assigning their right in the subject-matter to him, and empowering him to submit the same to arbitration) and the defendants, and a sum being awarded to him as such attorney; held,

that he might maintain assumpsit upon the award in his own name.

Banfill v. *Leigh.* 8 T. R. 571

5. Where goods were sold upon a contract that the vendee was to pay for them *in three months by a bill of two months:* held, that the contract was for a credit of *five* months, and therefore that assumpsit for goods sold and delivered could not be brought at the end of three months upon the neglect of the vendee to give his bill at two months; the remedy being by an action for damages for the breach of the contract in not giving the bill.

Mussen v. *Price.* 4 E. R, 147

6. *S. P.* in *Miller* v. *Shawe, Lancaster* Lent Assizes, 1801, cor. *Chambre J.* who also held, that after the time of credit expired *indebitatus assumpsit* would lie. 4 E. R. 149

7. If goods be bought to be paid for by a bill at two months, and the vendor accordingly draw upon the vendee for the value, who refuses to accept, *semb.* that the vendee cannot be sued in an action for goods sold and delivered, but upon the special contract only.

Dutton v. *Solomonson.* 3 B. & P. 582

8. But certainly he cannot be sued in that form of action till after the expiration of the two months. 3 B.& P.582

9. Where a plaintiff is precluded from recovering upon a promissory note for want of a proper stamp, if he can give other evidence of the consideration of his demand, he may recover on the common counts. 1 E. R. 58

11. *S. P. Tyte* v. *Jones,* Sittings at *Westminster* 1798 cor. Lord *Kenyon,* 1 E. R. 58, *n.*

Alves v. *Hodgson.* 7 T. R. 241

12. On an agreement between an outgoing and an incoming tenant, that the latter should buy the hay on the farm, and that the former should allow to the latter the expenses of repairing the fences, the balance due may be recovered on a general *indeb. assumpsit.*

Leeds v. *Burrows.* 12 E. R. 1

13. Assumpsit for use and occupation lies against a lessee from year to year, upon his agreement to pay rent during the tenancy; notwithstanding his bankruptcy and the occupation of the premises by his assignees during part of time for which the rent accrued.

Boot v. *Wilson. & al.* 8. E. R. 311

II. *Consideration; what shall raise an Assumpsit.*

1. Plaintiff was employed to wash clothes for defendant who was a prostitute, knowing her to be such: the Court of C. P. held that the use to which the clothes might be applied could not bar the plaintiff of an action for work and labour.

Lloyd v. *Johnson.* 1 B. & P. 340

2. But in an action for use and occupation of a lodging, it being shewn that the lodging was let with the knowledge of plaintiff for the purpose of prostitution, the action was held not to be maintainable. *Crisp* v. *Churchill,* B. R. *Girarday* v. *Richardson,* C. P. cited. 1 B. & P. 340, 1.

3. If all the creditors of an insolvent consent to accept a composition for their demands upon an assignment of his effects by a deed of trust, to which they are all parties, and one of them, before he executes, obtain from the insolvent a promissory note for the residue of his demand, by refusing to execute till such note be made, the note is *void* in law, as a fraud on the rest of the creditors; and a subsequent promise to pay it is a promise without consideration, which will not maintain an action.

Cockshot v. *Bennet.* 2 T. R. 763

4. For no subsequent promise can set up a security which is void at its creation. 2 T. R. 763

5. If it be only *voidable,* like a security given by an infant, it may be revived by a subsequent promise. 2 T. R. 766

6. But if a bankrupt, or insolvent, after becoming free from his engagements, voluntarily give security for a former demand, which is only due in conscience, it may be enforced in a court of law. 2 T. R. 765

7. A promise made by a friend of the bankrupt, when he was on his last examination, that in consideration that the assignees and commissioners would forbear to examine him touching certain sums which he was charged with having received, and not accounted for, he would pay such sums as the bankrupt had received and not accounted for, is void, as being against the policy of the bankrupt laws.

Nerot v. *Wallace (in error.)* 3. T. R. 17

8. *Quere,* If the creditors had consented to the agreement made by the assignees,

whether that would have varied the case? 3 T. R. 23. 25. 27

9. *A*, declared that in consideration that he at the request of *B*. had *consented and agreed to accept and receive* from *B*. a composition of so much in the pound upon a sum of money owing from *B*. to *A*, in full *satisfaction and discharge* of the debt, *B*. promised to pay the composition: the Court of C. P. on motion in arrest of judgment held that this was not a good consideration to maintain an assumpsit against *B*., a *mere accord* not being a ground of action. *Lynn* v. *Bruce*. 2 H. B. 317

10. The mere relation of landlord and tenant is a sufficient consideration for the tenant's promise to manage a farm in a husbandlike manner.

Powley v. *Walker*. 5 T. R. 373

11. A breach of trust may be the ground of an *assumpsit*.

Smith v. *Jameson*. 5 T. R. 603

12. The vendor of goods abroad, having packed them up by order of the buyer in a particular manner for smuggling them into this country, and knowing at the time that they were to be smuggled, cannot recover the value of them against the buyer, although he was not concerned in the risk of importing the goods into this country.

Waymell v. *Reed*. 5 T. R. 599 (And See *Biggs* v. *Lawrence*, 3 T. R. 454, tit. PARTNER. *Clugas* v. *Penaluna* 4 T. R. 466, tit. SMUGGLING.)

13. By a navigation act it was enacted, that on a certain day the first general meeting of the proprietors should be held, at which the company should execute deeds under their common seal for each distinct share, "which deeds should respectively vest a certain share in each proprietor;" the plaintiff declared in assumpsit against the defendant for not completing a contract for the purchase of some shares, and averred that on a day prior to the first general meeting "he was lawfully entitled to so many shares:" held, that this was a material averment, and the ground of a nonsuit, as it could not be proved: though there was another clause in the act, by which certain persons by name (of whom the plaintiff was one) were made a corporation for the purposes of the act: and the money subscribed was to be divided into so many equal shares, which were *thereby vested* in the person so subscribing, *&c.*

Latham v. *Barber*. 6 T. R. 67

14. Where the plaintiff declared that *A*., since deceased, was indebted to him so much, and that after his death, in consideration of the premises, and that he, at the instance of the defendant, would *forbear and give day of payment* for the debt (not stating *to whom* he was to *forbear*) the defendant promised *&c.*: held on demurrer to be no consideration for the promise; for a promise can only be sustained on a consideration of benefit to the defendant or of detriment to the plaintiff; and unless there were some person whom the plaintiff could have sued for his debt, his forbearance was no detriment to him. *Jones* v. *Ashburnham et Ux*. 4 E. R. 455

15. A captain of a troop is not liable for subsistence furnished to the men during the time of his absence, and while another officer is in the actual command of the troop, by whom the orders for subsistence are issued, and the subsistence money is received from government, though such captain was still entitled to a profit upon the sum issued on that account, and the troop still continued under his military orders.

Myrtle v. *Beaver*. 1 E. R. 135

15. The captain of a troop for which forage is furnished, by the orders of a clerk appointed by such captain, is not liable for such forage, though present with the troop at the time; it not appearing that he had received any money for this purpose from the paymaster, to whom it is issued by government, and upon whom the captain is entitled to draw for a certain sum regulated by the returns of the preceding month.

Rice v. *Chute*. 1 E. R. 579

17. *Aliter* if he had in effect received the money. *Rice* v. *Everitt*. 1 E. R. 583

18. A master is not liable upon an implied *assumpsit* to pay for medical attendance on a servant who has met with an accident in his service.

Wennal v. *Adney*. 3 B. & P. 247 And see a learned note by the reporters respecting the validity of an *express* promise founded on merely a moral obligation. 3 B. & P. 249

19. The law will not raise an implied promise in the parish where a pauper is settled to reimburse the money laid out by another parish in which he happened to be, in providing necessary medical assistance for him.

Atkins v. *Banwell*. 2 E. R. 505

20. Upon a sale of hops by the sample, with a warranty that the bulk of the

commodity answered the sample, the law does not raise an implied warranty that the commodity should be merchantable, though a fair merchantable price were given; and therefore if there be a latent defect then existing in it, unknown to the seller, and without fraud on his part (but arising from the fraud of the grower from whom he purchased), such seller is not answerable, though the goods turned out to be unmerchantable.

Parkinson v. *Lee.* 2 E. R. 314

21. One who marries a widow having children by her former husband is not bound to maintain such children, though they were maintained by the widow before her second marriage, at which time her second husband acquired her former means. Therefore if the second husband maintain such children, it is a good consideration for a promise made by them when they come of age, to repay the expense of their maintenance respectively: especially where the second husband was a man of small substance, and the children had a competent provision to receive when they came of age, which was to accumulate for them in the mean time, and he made no application to Chancery for an allowance out of the fund, as he might have done.

Cooper v. *Martin.* 4 E. R. 76

22. An action upon promises lies by a ship-owner to recover from the owner of the cargo his proportion of general average loss incurred by sacrificing the tackle belonging to a ship for an unusual purpose, or on an extraordinary occasion of danger, for the benefit of the whole concern.

Birkley v. *Presgrave.* 1 E. R. 220

III. *Assumpsit on express Promises or special Agreements.*

1. Where two enter into articles of partnership for seven years, in which is a covenant to account yearly, and to adjust, and make a final settlement at the expiration of the partnership, and they dissolve the partnership before the seven years are expired, and account together, and strike a balance which is in favour of the plaintiff, including several items not connected with the partnership, and the defendant promises to pay it, an action of *assumpsit* lies on such express promise.

Foster v. *Allanson.* 2 T. R. 479

2. An action of *assumpsit* may be maintained upon an express promise for the amount of a balance struck on a partnership account, though there was a covenant between the parties to account. *Moravia* v. *Levy.* Sittings at *Guildhall* 1786, cor. *Buller J.*

2 T. R. 483, *n.*

3. If a bankrupt, after obtaining his certificate, promise to pay a prior debt *when he is able*, in a general *indebitatus assumpsit* brought on that promise, the Court of C. P. (*dissent. Loughborough* C. J.) held, that the plaintiff must prove the ability of the defendant to pay. *Besford* v. *Saunders.* 2 H. B. 116

4. *A.* agrees to sell goods to *B.* who pays earnest; the goods are packed in cloths furnished by *B.* and deposited in a building belonging to *A.* until *B.* shall send for them; but *A.* declares at the same time, that they shall not be carried away until he is paid. *A.* cannot maintain an action for goods sold and delivered; this not being a delivery to *B.*

Goodall v. *Skelton.* 2 H. B. 316

5. *A.* in London received an order from *B.* living in Bristol to send him goods by any conveyance to Bristol informing *B.* when he sent them that he might know when to expect them, *A.* sent the goods to a wharf from whence a Bristol vessel sailed and informed *B.* that the goods would come by the ship *C.*, some time afterwards the goods were sent by another ship, *B.* enquired for the goods on the arrival of the ship *C.* at Bristol, but made no further enquiry, and *A.* did not know, till after he had required payment for the goods, that they were sent by another ship, which he then communicated to *B.*: held that *B.* was liable for the price of the goods.

Cooke v. *Ludlow.* 2 N. R. 119

6. An agreement to pay a per centage upon the day on which any money should be received by the defendant through the means of the plaintiff's information does not entitle the plaintiff to the stipulated reward upon the transfer of *Stock*, in consequence of such information; although he might *afterwards* receive the dividends thereon.

Jones v. *Brinley.* 1 E. R. 1

N. The court animadverted upon the immorality of such bargains: and imperfect evidence having been given of the receipt of dividends *due at the time of the transfer*, refused, to suffer that evidence to be supplied by affidavit.

1 E. R. 3

7. *A.* declared against *B.* and his wife, administratrix of *C.* deceased, "for that whereas *C.* died intestate, possessed of *South Sea* stock which she held in trust for *A.*, and upon which certain dividends were due, in consideration that *A.* at his own expense would procure administration to be granted to the wife of *B.* as next of kin to *C.* and would furnish evidence to enable *B.* and his wife to receive the dividends; *B.* and his wife, as such administratrix, promised to pay over to *A.* the amount of the dividends when received:" held, that the consideration stated was insufficient to support the promise: and that as the dividends never made part of the intestate's estate, the action against *B.* and his wife, as *administratrix*, could not be maintained.
Parker v. *Baylis & Ux.* 2 B. & P. 73

8. *A.* agreed in writing to pay the rent of certain tolls which he had hired, "to the treasurer of the commissioners:" held, that no action for the rent could be maintained in the name of the treasurer. *Pigot* v. *Thompson.* 3 B. & P. 147

9. The defendant promised to pay the plaintiff *5l. if he could provide a tenant for certain premises, and get him 350l. for his lease.* The plaintiff procured one *S.* with whom the defendant entered into an agreement, and received *50l.* as a deposit. *S.* not completing his engagement, the defendant consented to release him, but retained the *50l.*: held that this was a substantial performance of the condition on the part of the plaintiff, and that he was therefore entitled to recover the *5l.*
Horford v. *Wilson.* 1 *W.* P. T. 12

IV. *Assumpsit on behalf of third Persons.*

1. If the person, for whose use goods are furnished, be liable at all, any other promise by a third person to pay that debt must be in writing, otherwise it is void by the statute of frauds.
Matson v. *Wharam.* 2 T. R. 80

2. A tradesman delivers goods to *A.* at the request and on the credit of *B.*, who says before the delivery "*I will be bound for the payment of the money as far as 800l. or 1000l.*" This promise of *B.* not being in writing, is void by the statute of frauds, if it appear that credit was given to *A.* as well as *B.* *Anderson* v. *Hayman.* 1 H. B. 120

3. There is no distinction between a promise to pay for goods furnished for the use of another made *before* they are delivered, and one made *after.* 2 T. R. 80

4. A promise in these words, "if you do not know him, you know me, and I will see you paid," not being in writing, is void by the statute of frauds. 2 T. R. 80

5. So is this, "you must supply my mother-in-law with bread, and I will see you paid."
Jones v. *Cooper*, cited 2 T. R. 80 and also in *Cowp.* 227

6. *A.* having sent an order to *B.* for certain goods, *C.* undertakes to guarantee payment to *B.*, upon an undertaking of *D.* to indemnify *C.*; *B.* accordingly informs *C.* that the goods are preparing, and afterwards ships them for *A.* without giving notice to *C.* that they are shipped: afterwards *D.* desires to recal his indemnity, upon which *C.* writes to *B.*, to know whether he had executed the order, to which no answer is given by *B.* for a considerable time, he having gone abroad in the interim. Upon this *C.*, supposing from the silence of *B.* that the order was not executed, gives up his *indemnity* to *D.* *C.* still remains liable to *B.* on his guarantee. *Oxley* v. *Young & al.* 2 H. B. 613

7. A contract made by *A.* and *B.* (British subjects) for the purchase of brandy from a house of trade in an enemy's country, to be shipped from thence in a neutral ship on account of *A.* and *B.*, which contract was made in contemplation of obtaining a licence for that purpose, under 43 *G.* 3. *c.* 153. § 15., and which licence was obtained before the contract was begun to be executed, is a legal contract, and may lawfully be guaranteed by C. and *D.* British subjects, and after such licence obtained the guarantees are liable in damages for the non-shipment of the goods in the enemy's country on board a neutral sent there for that purpose.
Simson & al. v *Merac & al.* 9 E. R. 35

8. Upon an indebitatus assumpsit brought for board, schooling, &c. furnished for *J. W.* at the request of the defendant, the plaintiff is entitled to recover for a quarter over the time which *J. W.* staid, on the ground of a quarter's notice not having been given, that being one of the terms mentioned in the particulars of the school.
Eardley v. *Price.* 2 N. R. 233

9. A guarantee by the defendant to the plaintiff "for any goods he *hath* or *may* supply to *W.* with to the amount of *100l.*" is a continuing or standing guarantee to that extent for goods which may at any time have been supplied to

W. P. until the credit was recalled, although goods to the amount of more than 100*l.* had been before supplied and paid for.

Mason v. *Pritchard.* 12 E. R. 227

V. *Assumpsit for Money paid, laid out, &c.*

1. Assumpsit for money paid, laid out, and expended, will not lie, when the money has been paid against the express consent of the party, for whose use it is supposed to have been paid.

Stokes & al. v. *Lewis & al.* 1 T. R. 20

2. Nor will it lie on the voluntary payment of another's debt. 8 T. R. 308

Kilgour v. *Finlyson* (tit. PARTNERS.) 1 H. B. 155

But see *Jenkins* v. *Tucker* (BARON and FEME III.) 1 H. B. 90

3. But it will lie where one is compelled to make a payment for which another is liable. Thus, where the goods of a stranger on the premises of another were distrained by the landlord for rent in arrear, and the stranger was obliged to pay the rent to redeem them; the Court of K. B. held that the stranger might maintain assumpsit for money paid to the use of the original lessees who were bound by their covenants to the landlord, although some of them had, to the knowledge of the plaintiff before he placed his goods on the premises, assigned their interest to one of their co-lessees, who was in the exclusive possession at the time.

Exall v. *Partridge & al.* 8 T. R. 308

4. But it was held that an under-tenant, whose goods were distrained and sold by the original landlord for rent due from his immediate tenant, could not maintain an action for money paid to the use of such tenant; for on the sale under the distress the money paid by the purchaser vested in the landlord in satisfaction of the rent, and never was the money of the under-tenant.

Moore v. *Pyrke.* 11 E. R. 52

5. If *A.* recover *in tort* against two defendants, and levy the whole damages on one, that one cannot recover a moiety against another in an action for money paid to his use.

Merryweather v. *Nixan.* 8 T. R. 186

6. Aliter, if *A.* recover *in assumpsit* against two. *ib.*

7. A surety who gives a new security alone to the creditor, and has the old one cancelled, cannot sue the principal for *money paid* to his use.

Taylor v. *Higgins.* (AFFIDAVIT'I. 20.) 3 E. R. 169

8. Where a person will not rely on the promise which the law will raise, but takes a bond as a security, he cannot resort to an action of *assumpsit.*

Toussaint v. *Martinant.* 2 T. R. 100

9. Therefore if a surety bound with his principal, for payment of money by instalments, take a bond from the principal conditioned for payment of the amount of the instalments before the first of them will become due, and before that time the principal becomes bankrupt, and obtains his certificate, and afterwards the instalment bond is discharged by the surety, he cannot maintain an action against the principal for money paid to his use. 2 T. R. 160

10. Where two parishes had been a long time united, and had had a joint sexton, who was paid by both, and afterwards one of them claimed a right of electing a separate sexton, of which they had given notice to the other, that other parish cannot maintain an action for money paid, laid out, and expended, to the use of the first parish for their quota of the sexton's salary.

Stokes & al. v. *Lewis & al.* 1 T. R. 20

11. Neither can the right of the sexton be tried in such case without his being a party to it. 1 T. R. 22

12. Neither is the payment of the salary a joint obligation on the two parishes, for the sexton in such case cannot bring his action against one of the parishes for the whole sum. 1 T. R. 22

13. Upon a request to *A.* to accept a bill, and to draw upon *B.* for the same sum; if after *B.*'s refusing to accept the bill drawn on him by *A.*, *A.* pays the bill drawn on him for the honour of the drawer, he may recover back the amount of it from the drawer in an action for money paid, laid out, and expended. *Smith* v. *Nissen.* 1 T. R. 269

14. The plaintiffs, together with *A.* and *B.* being owners of one ship, and the defendant of another, a prize was taken, condemned, and shared by agreement between them; afterwards the sentence of condemnation was reversed, and restitution awarded with costs, which was paid solely by the plaintiffs *A.* and *B.* having in the mean time become bankrupts; an action for money paid to the use of the defendants cannot be brought by the plaintiffs alone for a moiety of the restitution money and costs, because it was either a partnership transaction, when *A.* and *B.* ought to be joined,

or not, when separate actions should be brought by each of the persons paying.

Graham v. *Robertson.* 2 T. R. 282

15. If two persons jointly engage in a stock-jobbing transaction, and incur losses, and employ a broker to pay the differences, and one of them repay the broker *with the privity and consent of the other* the whole sum, he may recover a moiety from that other in an action for money paid to his use, notwithstanding stat. 7 *G.* 2. *c.* 8; which avoids and declares illegal all stock-jobbing transactions.

Petrie v. *Hannay.* 3 T. R. 418

N. The principle of this decision is questioned in *Aubert* v. *Maze* (AGREEMENTS II. 13.), 2 B. & P. 371.: And see also *Steers* v. *Lashley*, 6 T. R. 61. and *Brown* v. *Turner*, 7 T. R. 730. BILLS OF EXCHANGE IX.

16. But in such a case of an *illegal* transaction, if one partner pay money for another, *without an express authority* he cannot recover it back. 3 T. R. 418

17. Where persons engaged in stock-jobbing, are also concerned in making real transfers of stock, and the balance is paid upon the whole by one for both of them, a moiety of the money paid on the real transactions may be recovered, even under circumstances in which the other part could not.

3 T. R. 418

18. A broker who contracts with others for the sale of stock at a future day by the authority of his principal, who afterwards refuses to make good the bargain, cannot by paying the difference to such third persons, maintain an action on an implied assumpsit against his principal for the amount. If the principal were really possessed of the stock so bargained to be sold, such contract is not illegal, within the stat. 7 *G.* 2 *c.* 8. against stock-jobbing, although the broker did not disclose the name of his principal at the time of the bargain made: and the purchaser may maintain an action for the difference against the principal.

Child v. *Morley.* 8 T. R. 610

19. If an officer permit a prisoner to go at large, on his promise to pay the debt to the creditor, in consequence of which the officer is obliged to pay the creditor himself, he cannot recover back the money from the debtor on an action for money paid to his use; having been guilty of a breach of duty out of which he cannot derive a cause of action. *Pitcher* v. *Bailey.* 8 E. R. 171

VI. *Assumpsit for Money had and received.*

1. The action of *assumpsit* for money had and received is like a bill in equity; and therefore the party must shew that he has conscience and equity of his side; so that it lies not against one who was known to be only a surety in an annuity bond for the payment of the annuity, to recover the consideration money after the annuity had been set aside for want of a memorial, though the surety had joined in a receipt for the money.

Straton v. *Rastall.* 2 T R. 370

2. *A.* being indebted to *B.* for brokerage, and *B.* indebted to *C.* for money lent, *B.* gives an order to *A.* to pay *C.* the sum due from *A.* to *B* as a security, on which *C.* lends *B.* a further sum; and the *order is accepted by A.*; on the refusal of *A.* to comply with the order, *C.* may maintain an action against *A.* for money had and received.

Israel v. *Douglas & al.* 1 H. B. 239 (See *Taylor* v. *Higgins* (AFFIDAVIT I. 20.), 3 E. R. 69, in which the Court of K. B. is said to have disapproved of this decision.)

3. The Court of C. P. held that if *A.* actually receive money of *B.* to the use of *C.* on an illegal agreement between *B.* and *C.*, this money may be recovered by *C.* in an action for money had and received. And it is doubtful how far the case is varied though *A.* be a party to the contract.

Tenant v. *Elliot.* 1 B. &. P. 3.
Farmer v. *Russel & al.* 1 B. & P. 296

4. Where a man has actually paid what the law would not have compelled him to pay, but what in equity and conscience he ought to pay, he cannot recover it back again in an action for money had and received.

Bize v. *Dickason.* 1 T. R. 286

5. Neither can he recover back a sum paid for a debt which would otherwise have been barred by the statute of limitations, or a debt contracted during his infancy. 1 T. R. 286

6. But where money has been paid under a mistake, which there was no ground in conscience to claim, the party may recover it back again in an action for money had and received to his use.

1 T. R. 286

7. A person having voluntarily offered to pay a sum of money for the use of the

poor, in order to avoid a prosecution, which offer was acceded to and the money accordingly paid by the party to such use, may countermand the application of the money before it is so applied, and recover it back in an action for money had and received.

Taylor v. *Lenday.* 9 E. R. 49

8. The testator having borrowed money on a *respondentia* contract prohibited by law, his executors, the plaintiffs, refunded the money to the lenders, the defendants: held that the executors, could not maintain an action for money had and received to recover back this money, notwithstanding the defendants could not have compelled them to pay it.

Munt v. *Stokes.* 4 T. R. 561

9. Where money has been paid by the plaintiff to the defendant under the compulsion of legal process, and it is afterwards discovered that the money was not due, the plaintiff cannot recover it back in an action for money had and received

Marriott v. *Hampton.* 7 T. R. 269

10. Money paid by one with full knowledge, or the means of such knowledge in his hands, of all the circumstances, cannot be recovered back again on account of such payment having been made under an ignorance of the law.

Bilbie v. *Lumley.* 2 E. R. 469

Qu. Where such payment was made under an uncertainty of the facts.

Chatfield v. *Paxton,* M. 39 *G* 3. cited. 2 E. R. 471

11. The action for money had and received to recover fees, was introduced in lieu of an assize. 6 T. R. 683

12. Money given to *A.*, and claimed by *B.*, as perquisites of office, cannot be recovered by *B.* in an action for money had and received, unless such perquisites be known and accustomed fees, such as a legal officer could have recovered from *A.*

Boyter v. *Dodsworth.* 6 T. R. 681

13. Where a person has his election either to bring trover or an action for money had and received, he may maintain the former notwithstanding the bankruptcy of the debtor after the cause of action accrued, and though the bankruptcy would be a bar to the latter.

Parker v. *Norton.* 6 T. R. 695

14. Assumpsit for money had and received lies when a payment has been made on a contract which is put an end to. *Towers* v. *Barret.* 1 T. R. 133

15. But if it continue open, the plaintiff can only recover damages for the breach of it; and then he must state the special contract. 1 T. R. 133

16. The difference between those cases where the contract is open, and where it is not so, is this: if the contract be rescinded, as where by the terms of it, it is left in the plaintiff's power to rescind it by any act, and he does it; or where the defendant afterwards assents to its being rescinded; the plaintiff is entitled to recover back his whole money; and then an action for money had and received will lie: but if the contract be open, the plaintiff's demand is not for the whole sum, but for damages arising out of it; and then he must state the special contract.

1 T. R. 133

17. Where an act is to be done by each party under a special agreement, and the defendant, by his neglect, prevents the plaintiff carrying the contract into execution, the plaintiff may recover back any money he has paid under it in an action for money had and received.

Giles v. *Edwards.* 7 T. R. 181

18. But a contract cannot be rescinded by one party for the default of the other, unless both can be put in *statu quo*, as before the contract. 5 E. R. 449

19. Therefore where *A.* agreed in consideration of 10*l.*, to let a house to *B.*, which *A.* was to repair and execute a lease of, *within ten days*, but *B.* was to have immediate possession, and execute a counterpart, and pay the rent: *B.* took possession, and paid the 10*l.* immediately; but *A.* neglected to execute the lease and make the repairs *beyond the period of the ten days*, notwithstanding which *B.* still continued in possession; held that on account of *B.*'s intermediate possession of the premises under the agreement, he could not, by quitting the house *for the default of A.*, rescind the contract, and recover back the 10*l.* in an acion for money had and received, but could only declare for a breach of the special contract. *Hunt* v. *Silk.* 5 E. R. 449

20. Assumpsit for money had and received lies against an overseer of the poor to recover money in his hands, which had been levied on a conviction which was afterwards quashed.

Feltham v. *Terry,* E. 13 *G.* 3. cited in *Birch* v. *Wright.* 1 T. R. 387

21. Assumpsit for money had and received does not lie by the nominee of a perpetual curacy for the profits thereof, till he has had the bishop's licence. *Powell* v. *Milbank*, M. 12 *G.* 3. 1 T. R. 399, *n.*

22. But it does lie by the nominee of a donative before the bishop's licence, against a person who receives the rents and profits.
R. v. *Bishop of Chester.* 1 T. R. 403

23. But where a donative had been twice augmented, it should seem the nominee cannot maintain such action without the bishop's licence. 1 T. R. 404

24. If a trader become a bankrupt by lying in prison two months after an arrest, his assignees may maintain an action for money had and received against a person, who, having notice that a commission would be issued against him, sold his goods and paid him the produce before the expiration of the two months.
King v. *Leith.* 2 T. R. 141

25. Money paid by a trader after a secret act of bankruptcy to a carrier, for the carriage of goods, may be recovered back by the bankrupt's assignees *in assumpsit* for money had and received.
Bradley and another, Assignees of Bradley v. *Clark* 5 T. R. 197

26. One partner may maintain an action for money had and received against the other partner for money received to the separate use of the former, and wrongfully carried to the partnership account. *Smith* v. *Barrow.* (tit. PARTNERS.) 2 T. R. 476

27. If a revenue officer seize goods as forfeited, which are not liable to seizure, and take money of the owner to release them, the latter may recover back the money in an action for money had and received; in which action the month's notice under 23 G. 3. *c.* 70. § 30. need not be given.
Irving v. *Wilson.* 4 T. R. 485

28. Assumpsit for money had and received does not lie against an excise officer to recover duties received by him after the act imposing them is repealed, if he have paid them over to his superior; and in such case he is entitled to a month's notice before the action is brought by 23 *G.* 3. *c.* 70. § 30. *Greenaway* v. *Hurd.* 4 T. R. 553

29. But it was held by the Court of C. P. that such an action does lie to recover back money which has been obtained through fear of process by distress, by an excess of authority, although it has been paid over to a third person who was the proper officer to whom it should have been paid supposing such distress had been legally made.
Snowden v. *Davies.* 1 W. P. T. 359

30. *A.*, with a view to accommodate *B.*, lent him a bill drawn by himself upon and accepted by *C.*, who had effects of *A.* in his hands; *B.* indorsed it to *D.* who indorsed it over; the day before the bill became due *B.* paid the amount to *A.*, who on hearing that *C.* had failed, gave *B.* a check for the amount of the bill, and sent him with it to *D.* to enable him to pay the bill when due; four days after that time *A.* learning that payment had not been demanded, desired *D.* not to pay the bill, as no notice of non-payment had been given by the holder, and offered to indemnify him; notwithstanding this, *D. afterwards* paid the bill: held that he paid it in his own wrong; and that *A.* was entitled to recover back from him the money he had so sent to him.
Whitfield v. *Savage.* 2 B. & P. 277

31. Goods distrained by the plaintiff were delivered by him to the defendant on his promising to pay the rent; held that an action for money had and received would not lie for the value of the goods, though the defendant did not pay the rent.
Leery v. *Goodson.* 4 T. R. 687

32. *A.* a femme sole, entitled to the profits of an estate vested in trustees for her separate use, conveys them for her separate use to *B.*, a married woman, without the intervention of trustees; *A.* marries, and the trustees, without notice of the conveyance to *B.*, pay the profits to *A.*; *B.*'s husband cannot maintain an action against *A.*'s husband for the money, as money received to his use.
Davison v. *Atkinson.* 5 T. R. 434

33. An action for money had and received will not lie to recover back from the under-writer the premium of a re-assurance (void by stat. 19 *G.* 2. *c.* 37.) after capture.
Andrée v. *Fletcher.* 3 T. R. 266

34. Where credit was given by insurance-brokers in an account delivered in by them to an underwriter for the premiums of re-assurances, after which the assured gave notice to the brokers not to pay the money over to the un-

derwriter, and indemnified them for withholding it; held that the underwriter could not maintain an action against the brokers to recover such premiums as for money had and received by them to his use, the transaction being illegal, and the money not having been actually paid, but only credit given for it on account.

Edgar v. *Fowler*. 3 E. R. 222

35. *A.* being indebted to *B.* in 700*l* applied to *C.* to lend him that sum, who agreed so to do, provided *A.* would allow him to deduct therefrom 80*l.* due from *B.* to himself upon stock-jobbing transactions; accordingly *C.* advanced 620*l*, and *A.* gave him a promissory note for 700*l.*; *A.* then paid over to *B.* the 620*l.* who gave him a discharge for the whole 700*l.*; the promissory note for 700*l.* given by *A.* being paid when due, *B.* brought an action against *C.* to recover 80*l.* as money had and received by *C.* to his use: held that *B.* could not maintain the action, but that it must be brought by *A.* if by any one.

Scholey v. *Daniel*. 2 B & P. 546

36. *A.*, supposing himself the legal representative of a lessee for years, sold the term, and delivered the lease to the purchaser, but without any assignment or formal conveyance, saying, "the premises were his, and if any thing happened he would see the purchaser righted;" it was held that *A.* was liable to the purchaser in an action for money had and received, the rightful administrator of the tenant for years having ousted the purchaser by ejectment.

Cripps v. *Reade*. 6 T R. 606

37. *A.* by his will devised to *B. C. D.* and *E.* two parcels of land upon trust, to sell and divide the money among his brother's and sister's children. *B. C. D.* and *E.*, the latter being one of 24 persons entitled under the will to a share of the money, were proceeding to sell, when it was agreed by the three first trustees, and the 23 other persons entitled to the money, that *E.* should become the purchaser of the two parcels of land, paying 300*l.* for one and 700*l.* for the other. A conveyance was accordingly prepared and executed by *B.* and *C.* only, upon which *E.* took possession of the lands and paid the purchase-money, which was divided among the several persons entitled under the will. *E.* being afterwards evicted from the smaller parcel in consequence of a defect in the title derived under the will, brought an action for money had and received against one of the 23 persons, to recover the share of the 300*l.* received by him, at the same time refusing to give up the parcel of land for which 700*l.* had been paid: held that the purchase of the two parcels formed distinct contracts; and that he was entitled to recover.

Johnson v. *Johnson*. 3 B. & P. 162

38. *A.* having sold certain leasehold premises to *B.*, assigned them by indenture, containing a proviso that *B.* should not assign over until the whole of the purchase money should have been paid. The premises having been taken in execution for a debt of *B.*, who had not paid the purchase money, were sold by the sheriff to *D.*, who paid down a deposit, and agreed to complete the purchase on having a good title: held that the non-payment of the purchase-money by *B.* was a sufficient objection to the title, and that *D.* might recover back his deposit in an action for money had and received.

Elliott v. *Edwards*. 3 B. & P. 181

40. A bill being presented by the indorsee to the drawee for acceptance, the latter on accepting it said, that he expected a remittance from the drawer in a few days, and that as he had a bill of the drawer in his hands which would be paid, he would take all risks: held that this conversation, together with the bill accepted by the drawee, did not amount to sufficient evidence to entitle the indorsee to recover against the drawee the amount of the bill accepted on a count for money had and received.

Whitwell v. *Bennett*. 3 B. & P. 559

41. Where money in litigation between two parties has by mutual consent been paid over to a person in trust for the party entitled, it can only be sued for and recovered, by the party entitled to it, from the trustee, and not from the original party who was indebted, though he agreed to waive all objections to form.

Ker v. *Osborne*. 9 E. R. 378

ATTACHMENT.

I. *Against Sheriff's.*

1. Where a sheriff has been guilty of a contempt in the course of a civil suit, and the defendant afterwards dies, an attachment may still issue against the sheriff for the contempt.

R. v. *Sher. Middlesex.* 3 T. R. 133

2. A sheriff who is ruled on the last day of a term to bring in the body, but goes out of office before the next term, is liable to an attachment for not bringing in the body.

Meakins v. *Smith.* 1 H. B. 629

3. Where any sheriff, before his going out of office, shall arrest any defendant, and a *cepi corpus* be returned, he may, within the legal time allowed, be called upon to bring in the body, though he may be out of office before such rule be granted. *Reg. Gen. K. B. T.* 31 *G.* 3. 4 T. R. 379

4. The court refused to grant an attachment against the sheriff for neglecting to take a replevin bond; the party injured may have his action.

R. v. *Lewis.* 2 T. R. 617

5. A rule issued in the vacation though tested in term time, requiring a sheriff to return a writ, is irregular; and an attachment against him for disobeying it will be set aside by the court on motion.

R. v. *Cornwall Sheriff.* 1 T. R. 552

6. A rule to bring in the body tested on the day of the sheriff's return of *cepi corpus*, though issuing afterwards in the vacation, is irregular.

R. v. *London Sheriff.* 2 E. R. 241

7. A sheriff is not liable to an attachment for not returning a writ, if not called upon *by a rule of court* within six months after the expiration of his office; a request by the party is not sufficient. *R.* v. *Jones.* 2 T. R. 1

8. A sheriff ought not to be ruled to bring in the body until the day after the expiration of the rule to return the writ; and if he be, and be attached for not obeying it, the court will set aside the attachment for irregularity.

Hutchins v. *Hird.* 5 T. R. 479

9. Where the rule to bring in the body was served on the last day of a term, the Court of K. B. held, that the bail have the whole of the first day of the next term to justify: and that if the defendant surrender in discharge of his bail on any part of that day, the sheriff cannot be attached for not bringing in the body.

R. v. *Middlesex Sheriff.* 8 T. R. 464

10. The sheriff having returned *cepi corpus* in Hilary term 1797, upon which the plaintiff proceeded no further until Michaelmas Term following, the Court of K. B. thought it unreasonable that the sheriff should be called upon to bring in the body after such delay, and set aside an attachment which had issued against him for not doing it.

R. v. *Surrey Sheriff.* 7 T. R. 452

11. A rule for an attachment against the sheriff for not bringing in the body, having been obtained on the 19th of November, and the attachment not sued out and served on the sheriff until the 9th of March following, the court (of C. P.) held the sheriff discharged and set aside the attachment.

R. v. *Perring.* 3 B. & P. 151

12. Where the rule for an attachment against the sheriff for not bringing in the body was obtained on the 11th of February, which attachment was returnable on the 4th of May, and the plaintiff did not issue the attachment till the 3d of May, and the defendant in the action became bankrupt on the 19th of March whereby the sheriff lost his opportunity of paying the debt, and proving it under the commission, the attachment was set aside for such laches.

R. v. *Sheriff of Surrey.* 9 E. R. 467

13. The plaintiff must proceed against the sheriff within a reasonable time, and after that is elapsed he cannot resort to the sheriff, although the plaintiff has been delayed by listening to a compromise offered by the defendant,

R. v. *London, Sheriff.* 1 W. P. T. 111

14. Where bail are put in after attaching the sheriff, and a trial has not been lost, the court will set aside the attachment; for in this case the plaintiff is not entitled to the benefit of it as a security in case he should recover. *Secùs* if a trial has been lost. *Hill* v. *Bolt*, 4 T. R. 352. *Gravett* v. *Williams*, T. 15 *G.* 3. 4 T. R. 352, *n.* *Callan* v. *Tye.* 2 H. B. 235

15. Upon an application to set aside an attachment against the sheriff for not bringing in the body, bail having been put in and no trial lost, the court require an affidavit of merits, if the application come from the defendant, but not if it come *bonâ fide* from the sheriff.

R. v. *Surrey Sheriff.* 7 T. R. 239

16. But where such attachment has regularly issued, the court will on no account relieve the sheriff, if it appear

that he let the defendant out of custody without taking from him such a bail-bond as is required by the statute. 7 T. R. 239

17. The sheriff is liable to an attachment for not bringing in the body, if the allowance of bail be not served, though the bail justified. 4 T. R. 493

18. The court will not discharge an attachment against a sheriff for not returning a writ of execution, except upon payment of the *whole debt and costs*, and the costs of the application, where there are circumstances attending the transaction which induce a suspicion of fraud in the party obtaining a priority in execution, or in the sheriff's bailiff.

R. v. *Middlesex Sheriff.* 1 H. B. 543

19. After an attachment against the sheriff for not bringing in the body, the Court (of K. B.) will only relieve him upon paying the whole debt and costs, and not merely the sum sworn to and costs. *Heppel* v. *King.* 7 T. R. 370

20. If the sheriff discharge the defendant without taking a bail bond, the court will not permit the defendant to file common bail on paying the sum sworn to, if the plaintiff have any claim on him beyond that sum.

Stevenson v. *Cameron.* 8 T. R. 28

21. Since the stat. 43. *G.* 3 *c.* 46. § 2. the sheriff cannot relieve himself from an attachment for not bringing in the body by payment of the debt sworn to and endorsed on the writ, he having neglected to take the money at the time of the arrest as directed by that act; but he must pay the whole debt and costs.

R. v. *London, Sheriff.* 9 E. R. 316

22. An attachment against the sheriff granted on the 24th of *January*, was set aside (in K. B.) for irregularity, he having been ruled to bring in the body on the 23d of *November* preceding, which expired on the 28th, and having put in bail above on the 24th, though the time for putting it in expired on the 22d; and the defendant being surrendered in discharge of his bail on the 28th, without the bail having justified.

R. v. *Middlesex Sheriff.* 7 T.R 527

23. The rule of court of *T.* 33 *G.* 3. (as to rendering a defendant, see 5 T. R. 368; the first rule there) extends to the case of the sheriff. 7 T. R. 527

24. The Court of K. B. determined, that if the sheriff be once in contempt for not bringing in the body, that contempt is not purged by the defendant surrendering on a subsequent day; though before an attachment be moved for against the sheriff.

R. v. *Middlesex Sheriff,* (in *Taylor* v. *Odin.*) 8 T. R. 29

25. But in this the practice of K. B. differs (and so the Court stated in the preceding case) from that of C. P., which latter determined, that though the rule to bring in the body has expired, yet if the defendant justify bail, before the plaintiff moves for an attachment against the sheriff, it is in time to prevent the attachment.

Thorold v. *Fisher.* 1 H. B. 9

26. In the Court of C. P. bail were allowed to justify after the rule on the sheriff had expired, on payment of the costs of the opposition.

Weddall v. *Beyer.* 1 B. & P. 325

27. And in the same term, that court allowed the defendant to justisfy bail, after an attachment issued against the sheriff, but gave leave to the plaintiff to oppose them without prejudice.

Williams v. *Waterfield.* 1 B. & P. 334

28. And where bail were brought up on the same day on which an attachment had been obtained against the sheriff, that court permitted the bail to justify and set aside the attachment, on payment of costs: and as the rule for the attachment had not been drawn up, the costs given were only those of preparing it.

Turner v. *Bristow.* 2 B. & P. 38

29. The Court of K. B. holds that *where bail are put in, in due time,* an exception must be entered before the sheriff can be ruled to bring in the body: and that the adding bail afterwards, does not supersede the necessity of such exception, before an attachment can issue against the sheriff on account of the added bail not having justified in due time.

R. v. *Middlesex Sheriff.* 8 T. R. 258

30. Where an exception to bail was regularly entered, and the defendant's attorney having *verbal* notice of it, proceeded by giving notice of justification, and attempting to justify, yet the Court (of C. P.) held, that notice *in writing* of such exception, must have been given to make the *sheriff* liable to an attachment for not bringing in the body. *Cohn* v. *Davis.* 1 H. B. 80

31. So that court held, that notice of justification of bail is not such a waver

of the default of not giving notice of exception, as to support a rule *on the sheriff* to bring in the body; though it is a waver as between the plaintiff and defendant.

Rogers v. *Mapleback.* 1 H.B. 106

32. The Court of C. P. held, that though an attachment is irregular, if the rule to bring in the body issues before the time for putting in bail has expired, yet if the sheriff neglect to apply to the court in due time to set aside the attachment, the irregularity is waved. *Rolfe* v. *Steele.* 2 H.B. 276

33. Where a rule to bring in the body expires on the last day of term, plaintiff may at the rising of the court on that day, move for an attachment, which may be accordingly issued on the following day, provided bail shall not then be perfected, or the defendant surrendered. *Reg. Gen. C. P. T.* 38 *G.* 3. 1 B. & P. 312

34. If the affidavit upon which a motion for an attachment be founded, merely state that the officer of the sheriff was served with a copy of the rule to bring in the body, but do not add that the original rule was shewn to him; the court will set aside the attachment.

Bernard v. *Berger.* 1 N.R. 121

(See *post*, III. 8.)

35. The Court of C. P. held that a cognovit, conditioned for payment of the debt and costs by instalments, given without the knowledge of the sheriff, discharged him.

R. v. *Surrey, Sheriff.* 1 W.P.T. 159

36. The Court of C. P. held that where the plaintiff, at the desire of the sheriff's officer, forbore to enforce an attachment in the first instance, and ten days afterwards applied to the sheriff for the debt and costs, that the sheriff was not discharged by the indulgence given to the officer.

R. v. *London Sheriff.* 1 W. P. 489

II. *Against privileged Persons.*

1. The court will not grant an attachment against a peer for not paying money awarded, though the defendant consent that it shall issue, on condition that shall lie in the office for a certain time. *Walker* v. *The Earl of Grosvenor.* 7 T. R. 171

2. Nor against a member of parliament. *Catmur* v. *Sir E. Knatchbull.* 7 T. R. 448

III. *Against others for contempt.*

1. No rule for an attachment (either in K. B. or C. P.) shall be absolute in the first instance, except for non-payment of costs on an *allocatur.*

Chaunt v. *Smart.* 1 B. & P. 477

2. If a defendant in a penal action obtain a rule to stay proceedings on paying a sum agreed upon between him and the plaintiff, it is an undertaking by him to pay that sum, and for the non-payment of it the court will grant an attachment.

King q. t. v. *Clifton.* 5 T. R. 257

3. If an arbitrator award, among other things, that each party shall pay a moiety of the costs of the arbitration, and of making the submission a rule of court; and one party, in order to get the award out of the hands of the arbitrator, pay the whole, he may have an attachment against the other party if he refuse to pay his moiety.

Hicks v. *Richardson.* 1 B. & P. 93

4. An attachment may be granted for making an insufficient return to the first writ of *habeas corpus*, without issuing an *alias* and a *pluries* writ.

R. v. *Winton.* 5 T. R. 89

5. The ten days after a demand of costs under a recognizance taken by virtue of stat. 5 *W. & M. c.* 11. § 2, 3, must elapse before an attachment can be granted against the party refusing to pay them.

R. v. *Ireland.* 3 T. R. 512

6. Though the plaintiff discontinue on the common rule on payment of costs, he is not liable to an attachment for non-payment.

Stokes v. *Woodeson.* 7 T. R. 6

7. Where plaintiff sued as a pauper, and defendant put off the trial on undertaking to pay the costs of the day, an attachment was granted by the Court of C. P. for non-payment.

Rice v. *Brown.* 1 B. & P. 39

8. An affidavit to support a rule for an attachment for a contempt must state that the defendant was served personally with a copy of the rule, and that the original was shewn to him at the same time. *R.* v. *Smithies.* 3 T. R. 351

(See *ante*, I. 32.)

9. But where a *mandamus* has been granted for the election of a mayor under stat. 11 *G.* 1, *c.* 4. § 2; and a rule made that public notice should be affixed in the market-place, which has been done accordingly, the court will

grant an attachment for disobeying the *mandamus*, against a member of the corporation who was served with a copy of the rule, notwithstanding neither the original *mandamus* or rule was shewn to him; for the public notice directed by the act is *primâ facie* sufficient. *R.* v. *J. Edycean.* 3 T. R. 352

10. Though the application for the attachment would be well answered, if the party could shew that he had no notice of the *mandamus*. 3 T. R. 352

11. Where a rule had been granted for a *quo warranto* information against *A.* as mayor of *B.*, on the relation of some of the corporators, and another rule *in that cause* for inspecting *all* the corporation books, papers, *&c.* directed to the town clerk, an inspection of *such only as related to the election and office of mayor* was held a sufficient compliance with the latter rule, so as to protect the town-clerk, acting *bonâ fide*, from an attachment as for a contempt of the court. *R.* v. *G. Babb.* 3 T. R. 579

12. The Court of C. P. refused to grant an attachment against a witness, for not obeying a *subpœna* to attend at a trial; on the ground that the whole expenses of the journey, and of the necessary stay at the place of trial were not tendered at the time of serving the *subpœna*. *Fuller* v. *Prentice.* 1 H. B. 49

13. A *subpœna* may be issued from the crown-office requiring a witness to attend at the assizes in the country to give evidence in support of an intended prosecution for a felony; and the Court of K. B. will grant an attachment against him for not attending accordingly. *R.* v. *G. Ring.* 8 T. R. 585

IV. *Interrogatories on;*

1. When a defendant is brought up on an attachment for a rescue, it is the practice of the court to put interrogatories to him, though he do not deny the charge in the affidavits, unless the prosecutor wave putting them.
R. v. *J. Horsley.* 5 T. R. 362

2. When an attachment issues in order to compel a person to answer upon interrogatories, the name of the cause must be inserted in the list of peremptory motions for the next term.
Reg. Gen. H. 34 *G.* 3. 5 T. R. 547

3. Interrogatories to be exhibited to a person, against whom an attachment has been ordered, must be signed by counsel. *Reg. Gen. M.* 34 *G.* 3. 5 T. R. 474

ATTORNEY.

I. *Admission & Clerkship; Rules as to.*

1. No attorney employed as a writer or clerk by any other attorney shall, during such employment, take or have any clerk under articles; and no service to such attorney shall be deemed good. No person articled to an attorney shall serve the agent of such attorney under such articles longer than one year of his clerking; and such service beyond that time shall not be good. Any person applying to be admitted an attorney of *B. R.* who has not been admitted an attorney or solicitor of any other court, shall for one full term, previous to application to be admitted, cause his name and place of abode, and the name and place of abode of the attorney to whom he was articled, to be affixed, in legible characters, on the outside of the Court of *B. R.* where public notices are usually affixed, and in a conspicuous place in the chambers of each of the judges of the court, and in the King's Bench Office: otherwise he cannot be admitted an attorney.
Reg. Gen. T. 31 *G.* 3. 4 T. R. 379

2. This rule extends to services performed before as well as after *Michaelmas* term. *M.* 32 *G.* 3. 4 T. R. 492

3. No person can be admitted an attorney, unless one full term previous to the term in which he applies to be admitted he enter in a book at each of the judges' chambers his name and place of abode, and also the name and place of abode of the attorney to whom he has been articled.
Reg. Gen T. 33 *G.* 3. 5 T. R. 378

4. Every person admitted an attorney of C. P. (not being an attorney of K. B. or a solicitor in Chancery or in the Exchequer) must, before he is sworn, file with the secondary his articles of clerkship, with the affidavit of the execution thereof, and of due service under the same, and that the notices have been given required by the rule 31 *G.* 3. 1 B. & P. 80

5. The stat. 2 *G.* 2. *c.* 24. requiring (as a previous qualification to being admitted as an attorney) that the party shall *continue in the service* of the attorney to whom he was articled for five years, is not complied with by the clerk serving part of the time with another attorney with his master's con-

sent, and the rest of the time with his master.

Ex parte Hill. 7 T. R. 456

6. A solicitor in Chancery may practice in the equity side of the Exchequer without being admitted a solicitor in the latter court.

Meddowcroft v. *Holbrooke.* 1 H. B. 50

II. *Certificate; when necessary; and Action for want of.*

1. The stat. 25 *G.* 3. *c.* 80. which gives a penalty against attornies prosecuting or defending without a certificate, a suit *in any court holding pleas*, where *the debt or damage shall amount to* 40*s. or more*, does not extend to the sheriff's court; though an attorney prosecute a suit there by virtue of a writ of *justices* for more than 40*s.*

Cross v. *Kaye.* 6 T. R. 663

2. A common informer may recover penalties against an attorney for not entering his certificate according to the provisions of 37 *G.* 3. *c.* 90. § 26. though no such power is expressly given to him by that statute; for the 25 *G.* 3. *c.* 80. which gives that power, and the 37 *G.* 3. *c.* 90. are *in pari materia.*

Davis v. *Edmonson* (in error). 3 B. & P. 382

III. *His Bills; Taxation and Payment of.*

1. The court will refer an attorney's bill to be taxed, though *all* the business to be done at the quarter sessions.

Ex parte Williams. 4 T. R. 496

2. An attorney cannot maintain an action for such a bill, unless he has first signed and delivered it.

Clarke v. *Donovan.* 5 T. R. 694

3. And as the statute requires that the bill should either be delivered to the party personally, or "left at his dwelling or last place of abode:" leaving it at his counting-house is not a good delivery. 2 B. & P. 343

4. And it must be left in the custody of the defendant.

Brooks v. *Mason.* 1 H. B. 290

5. To maintain an action by one attorney against another, for business done by the plaintiff for the defendant, *before* the defendant *became an attorney*, it is not necessary for the plaintiff to leave his bill signed, the *stat.* 12 *G.* 2. *c.* 13. applying to the case of both parties being attornies when the action is brought.

Ford v. *Maxwell.* 2 H. B. 589

6. If any part of an attorney's bill be for business done in the court, the bill must be delivered a month before the action is brought, otherwise the plaintiff cannot recover, though some of the items be for business not taxable.

Winter v. *Payne.* 6 T. R. 645.
Hill v. *Humphreys.* 2 B. & P. 343

7. *Semble* this rule would hold though some of the items were wholly unconnected with the plaintiff's professional capacity. 2 B. & P. 345

8. But if an attorney have a demand for taxable business, and also for conveyancing, and deliver no bill, it seems he might recover for the conveyancing only. 2 B. & P. 345

9. An attorney not having delivered any bill to his client before action brought, but having delivered a bill of particulars of his demand under a judge's order, after action brought, is entitled to recover items of charge for money paid for his clients use, having no reference to his business of an attorney: although other items in the bill of particulars might be taxable.

Mowbray v. *Fleming.* 11 E. R. 285

10. Charges for "drawing an affidavit of debt, and getting it sworn," are for business done in the courts. 6 T. R. 645

11. The statute 2 *G.* 3. *c.* 23. being beneficial to the subject, ought to receive a liberal construction. 6 T. R. 646

12. An attorney is not liable to pay the costs of taxing his bill under the *stat.* 2 *G.* 2. *c.* 23. § 23. where the deduction of one sixth is occasioned, not by the particular items being taxed, but by a whole branch of it being disallowed.

White v. *Milner.* 2 H. B. 357

13. Where upon the taxation of an attorney's bill a sum was deducted, less than one sixth of the amount of the bill delivered, including disbursements to pay which the client had advanced money to the attorney, the court ordered the client to pay the costs of taxation.

Hindle v. *Shackleton.* 1 W. P. T. 536

14. The Court of C. P. refused to stay proceedings in an action on an attorney's bill brought subsequent to the order of a judge of K. B. for its taxation, but previous to the taxation having taken place.

Steventon v. *Watson.* 1 B. & P. 365

15. On the taxation of costs, the Court of C. P. held delivery of an attorney's bill to be conclusive evidence against an increase of charge in a subsequent

bill on any of the *items* contained in it: and strong presumptive evidence against any additional *items*.

Loveridge v *Botham* 1 B. & P. 49

16. So when the bill has been delivered a proper time before the action brought, and never referred for taxation, the defendant cannot on the trial dispute the reasonableness of the charges.

Anderson v. *May*. 2 B. & P. 237

17. And a copy of the bill is good evidence without notice to produce the original. 2 B. & P. 237

18. If judgment for the plaintiff on an attorney's bill be affirmed in the Exchequer Chamber, that court will not allow interest. *Walker* v. *Bayley* (in error). 2 B. & P. 219

19. Though the court will not interfere on behalf of an attorney, and prevent the plaintiff's settling his own cause without first paying the attorney's bill, yet when the adverse party, against whom a judgment has been obtained, applies to get rid of that judgment, the court will take care that the attorney's bill is satisfied.

Mitchell v. *Oldfield*. 4 T. R. 123

20. If the defendant's attorney pay to the plaintiff the debt and costs recovered after notice from the plaintiff's attorney, not to do so till his bill has been first satisfied, the former is liable to pay over again to the latter the amount of his lien on such debt and costs of the suit.

Read v. *Dupper*. 6 T. R. 361

21. The lien of the plaintiff's attorney on the debt and costs recovered in the cause must be satisfied before the defendant is entitled to set off the costs recovered by him in another cause against the plaintiff, on a summary application to the court.

Randall v. *Fuller*. 6 T. R. 456

22. An attorney has a lien for his bill of costs, on money levied by the sheriff under an execution on a judgment recovered by his client, and is entitled to have it paid over to him, notwithstanding the sheriff has had notice from the party against whom the execution issued to retain the money in his hands, and that the court would be moved to set aside the judgment for irregularity; and notwithstanding a docquet has been struck against the client becoming a bankrupt.

Griffin v. *Eyles*. 1 H. B. 122

23. An attorney has a lien upon a sum *awarded* in favour of his client, as well as if recovered by judgment: and if after notice to the defendant the latter pay it over to the plaintiff, the plaintiff's attorney may compel a repayment of it to himself; and he shall not be prejudiced by a collusive release from the plaintiff to the defendant. *Ormerod* v. *Tate*. 1 E. R. 464

24. The plaintiff having charged the defendant in execution, died: the defendant's wife took out administration to the plaintiff; the Court (of K. B. ordered the defendant to be discharged out of custody; saying, that the plaintiff's attorney had no lien on the judgment for his costs.

Pyne v. *Erle*. 8 T. R. 407

25. Upon an order being obtained for taxing an attorney's bill, and delivering up papers for the purpose of changing the attorney, the attorney to whom the money is to be paid is entitled to the possession of the original order.

Alger v. *Hefford*. 1 W. P. T. 38

26. Negligence in the conduct of a cause cannot in general be set up as a defence to an action on an attorney's bill.

Templer v. *M'Laghlan*. 2 N. R. 136

IV. *His Privilege:*

1. The privileges of an attorney only continue while he is a practising attorney, and while he has the certificate required by 25 *G.* 3. *c.* 80.

Brooke v. *Bryant*. 7 T. R. 25

2. And therefore it was ruled that an attorney, who had not practised for several years, might be arrested, though after the suing out of the writ, and before the arrest, he recommenced his practice and took out his certificate.

7 T. R. 25

Fairman v. *Bryant*, S. P. 7 T. R. 26

3. The Court of C. P. held that an attorney should not be allowed his privilege unless he shew that he has practised within a year previous to his arrest. *Dyson* v. *Birch*. 1 B. & P. 4

4. If an attorney sue as a common person the Court of C. P. will give the defendant leave to plead that the cause of action arose within the jurisdiction of the Court of Requests together with other matters.

Tagg v. *Madan*. 1 B. & P. 629

5. So in such case if a sum under 40*s.* be recovered, and the defendant reside in *Middlesex*, they will allow him to enter a suggestion under the 23 *G.* 3. *c.* 33. § 19. (the *Middlesex* County Court act.) *Parker* v. *Vaughan*. 2 B. & P. 29

6. Attornies plaintiffs are not by the London Court of Conscience act, 39, 40 *G.* 3. *c.* 104. compellable to sue there a defendant residing in London, though an attorney, for a debt under 5*l.*
Board v. *Parker.* 7 E. R. 46
7. An attorney shall not have his privilege in a proceeding on the custom of foreign attachment in *London.*
Ridge v. *Hardcastle.* 8 T. R. 417
8. An attorney sued with his wife for a debt incurred by her dum sola, loses his privilege.
Roberts v. *Mason & Ux.* 1 W. P. T. 254
9. A bill may be filed against an attornep in the vacation.
Waghorne v. *Fields.* 5 T. R. 173
10. And the day of filing it may be inserted in the memorandum.
Dodsworth v. *Bowen.* 5 T. R. 325
11. An attorney when *plaintiff* may lay the *venue* in *Middlesex;* but when defendant, he has no privilege to change the *venue* to *Middlesex.*
Yeardley v. *Roe.* 3 T. R. 573
12. An attorney plaintiff cannot sue an attorney defendant by attachment of privilege and hold him to bail; if he do, the defendant may plead his privilege in abatement, or the court will discharge him out of custody and stay the proceedings, without costs.
Barber v. *Palmer.* 6 T. R. 524
Nichols v. *Earle.* 8 T. R. 395
13. An attorney plaintiff may sue by common process, and indorse his own name on the copy as the attorney, and may afterwards declare by another attorney. *Jackson* v. *Barnard.* 7 T. R. 35
14. An attorney when in prison may sue by attachment of privilege for a debt of his own notwithstanping the stat. 12 *G.* 2. *c.* 13. § 9.
Kaye, one, &c. v. *Deneve.* 7 T. R. 671
15. When an attorney sues by attachment of privilege, his name need not be indorsed on the writ; for stat. 2 *G.* 2. *c.* 23. § 22. which requires the name of the plaintiff's attorney to be indorsed on the writ, only extends to cases where the attorney sues for another person.
Fields, one, &c. v. *Lewen.* 4 T. R. 275
16. An attorney defendant is only entitled to four days notice to plead, though he reside more than 20 miles distance from *London.*
Mann v. *Fletcher.* 5 T. R. 369
17. In an action by an attorney for words spoken of him in his profession, he need not prove that he is an attorney by his admission, or by a copy of the roll of attornies; proof that he acted as such is sufficient.
Berryman, one, &c. v. *Wise.* 4 T. R. 366
18. An attorney of K. B. in pleading his privilege against being sued by original, improperly stated the custom of that court to be not to compel its attornies to answer an original writ unless *first prejudged from their office* (which is the custom in C. P. but not in B. R.): the court, however, held that enough appearing to sustain the plea of privilege they would take notice that an attorney could only be sued by bill, and would reject the custom, which had no foundation, as surplusage.
Stokes v. *Mason.* 9 E. R. 424.

V. *Summary Jurisdiction of the Court over.*

1. The court under circumstances will entertain a summary jurisdiction over an attorney of the court in obliging him to deliver up deeds, *&c.* on satisfaction of his lien, though they came into his hands as steward of a court, and receiver of rents.
Hughes v. *Mayre.* 3 T. R. 275
2. But if it appear that a third person is interested in the deeds, the court will take a security from the person to whom they are delivered to produce them on demand for the inspection of such third person. 3 T. R. 275
3. After verdict the Court of C. P. refused to compel an attorney to discover his client's place of abode.
Hooper v. *Harcourt.* 1 H. B. 534
4. The Court of K. B. refused to compel an attorney to deliver up, on payment of his bill, a lease put into his hands for the purpose of his making an assignment of it; there being no cause in court, nor any criminal conduct imputed to him. *Lowe's Case.* 8 E. R. 237

VI. *His Liability on Undertakings, &c.*

1. The undertaking of the defendant's attorney, in order to procure his discharge, to put in bail or pay the debt, is not within stat. 23 *H.* 6. *c.* 9; which avoids all undertakings made for a prisoner's discharge, except *bond* taken by the *sheriff* for the prisoner's appearance, *&c.*, because it is given to the plaintiff in the action, and not to the sheriff. *Rogers* v. *Reeves.* 1 T. R. 418
2. On the defendant's arrest his attorney procured his enlargement by under-

taking to give a bail-bond to the sheriff in due time; which he afterwards neglected to do, and the plaintiff recovered against the sheriff for the escape: held, that such undertaking being contrary to the statute 23 *H.* 6. *c.* 9. the court would not proceed summarily against the attorney to make him pay the debt and costs for his breach of faith.

Sedgeworth v. *Spicer.* 4 E. R. 568

3. If *A.* be indebted to *B.* and pay such debt to the attorney of a person suing *A.* in *B.*'s name, but without his authority, *A.* is notwithstanding obliged to pay *B.* again; and *A.*'s remedy is against the attorney who trusted to the counterfeited warrant of attorney from *B.* although he conceived that he was acting under the real authority of *B.*

Robson v. *Eaton.* 1 T. R. 62

AUCTION.

1. A bidder at an auction, under the usual conditions that the highest bidder shall be the purchaser, may retract his bidding any time before the hammer is down. *Payne* v. *Cave.* 3 T. R. 148

2. If the owner of goods, or an estate, put up to sale at an auction, employ puffers to bid for him without declaring it, and there is only one real bidder who by means of the puffer is induced to purchase at a high price, such purchaser shall not be compelled to complete the contract: and the stat. 28 *G.* 3. *c.* 37. makes no difference. *Howard* v. *Castle.* 6 T. R. 642. —See *Blachford* v. *Preston, ob dict.* 8 T. R. 93. 95

3. An auctioneer employed to sell the goods of a third person by auction, may maintain *an action for goods sold and delivered* against a buyer, though the sale were at the house of such third person, and the goods were known to be *his* property.

Williams v. *Millington.* 1 H. B. 81

4. *Qu.* Whether the selling goods by auction within the city of *London*, by an auctioneer who has paid the duty of 20*s.* for a licence required by the stat. 17 *G.* 3. *c.* 50. but who has not been admitted as a broker by the Court of a mayor and alderman, makes him liable to the penalty of the 6 *Anne*, *c.* 16. for acting as a broker without being so admitted?

Wilkes v. *Ellis.* 2 H. B. 555

Semb. That it does not.

5. Where the agent of the owner at an auction for the sale of an estate put it up in so many lots at certain prices, and no person bidding for the same, he put it up again in fewer lots at other certain prices; and still no person bidding, he put it up all together in one lot, at a certain price; and on no person's bidding the estate was withdrawn from sale: held, that this is not a bidding of the owner by an agent, so as to subject the party to the auction duty for want of a notice in writing to the auctioneer (previous to the auction) of such agency, as required by stat. 19 *G.* 3. *c.* 56. and 28 *G.* 3. *c.* 37. in order to excuse the owner from the payment of the auction duty.

Cruso v. *Crisp.* 3 E. R. 337

6. Sugars being advertised for sale by auction, samples were produced to the bidders assembled: after the biddings closed these samples were delivered to and accepted by the purchaser as part of the purchase, to make up the quantity of sugars; and a fire having consumed the sugars before the delivery thereof to the purchaser, held that at common law there was a sale to change the property at the time and place of auction: and that the delivery to and acceptance by the buyer of the samples, as part of the sugars purchased, took the case out of the statute of frauds.

Hinde v. *Whitehouse & al.* 7 E. R. 558

7. Turpentine in casks being sold by auction at so much per cwt., and each lot except the last two (which were sold at uncertain weights) was to be taken at the weight at which it was marked: out of the last two lots the other casks in the other lots were to be filled up before they were delivered to the purchasers: a deposit was paid for what was purchased, and the remainder was to be paid within 30 days on delivery of the goods: the buyers had the option of keeping the goods in the warehouse for these 30 days rent free: the buyers employed their agent, who filled up some of the casks out of the last two lots, but before he could fill up the rest a fire consumed the whole in the warehouses within the 30 days: held that the property passed to the buyers in all the casks which were filled up, but that the property in the casks not filled up remained with the seller at whose risk they continued.

Rugg v. *Minett.* 11 E. R. 210

8. An auctioneer is an agent lawfully authorized by the buyer to sign a contract for him, and his authority is given by the buyer bidding aloud: and the name of a purchaser of divers lots at an auction being written down on the sale bill opposite to such lots, for which the purchaser was declared to be the highest bidder, is a note or memorandum in writing sufficient to satisfy the intent of the stat. of frauds.

Emmerson v. *Heelis*. 2 W. P. T. 38

AWARD.

I. *Submission, Effect of.*

1. The court have no authority by 9 & 10 *W.* 3. *c.* 15. to make a parol submission to an award a rule of court.

Ansell v. *Evans*. 7 T. R. 1.

2. If a bond of submission to arbitration between the trustee of a wife and her husband recite, that a suit for separation has been instituted between the husband and wife in the Commons, and that, in order to put an end to any contest about the terms of separation, it had been agreed that all matters should be referred to *I. S.*, and either of the parties should be "at liberty to apply to *the court* to make the *award* a rule of court;" such submission may be made a rule of the Court of Common Pleas under stat. 9 & 10 *W.* 3.

Soilleux v. *Herbst*. 2 B. & P. 444

3. The Court have jurisdiction under that statute, though the submission bond were to make the *award*, instead of the *submission*, a rule of court.

Pedley v. *Westmacot*. 3 E. R. 603

4. Where parties by an indorsement in general terms on the bond of submission to arbitration agree that the time for making the award shall be enlarged, such agreement virtually includes all the terms of the original submission to which it has reference, amongst others, that the submission for such enlarged time shall be made *a rule of court*; and consequently the party is liable to an attachment for non-performance of award made within such enlarged time, under the stat. 9 & 10 *W.* 3. *c.* 15.

Evans v. *Thompson*. 5 E. R. 189

5. Where an arbitrator has power to enlarge the time for making his award to any other day, he may enlarge it more than once.

Payne v. *Deakle*. 1 W. P. T. 509

6. A submission to arbitration of *all matters in difference between the parties in the suit* is not confined to the subject-matter in the particular action depending, but will extend to cross demands between the parties, though not pleaded by way of set-off; and the costs being to abide the event makes no difference.

Malcolm v. *Fullarton*. 2 T. R. 645

7. But a reference of *all matters in dispute in the cause between the parties* is confined solely to the matters in dispute in that suit. 2 T. R. 644

8. An award made upon a reference *of all matters in difference* between the parties does not preclude the plaintiff from suing upon a cause of action subsisting against the defendant at the time of the reference, upon proof that the subject-matter of such action was not laid before the arbitrators, nor included in the matters referred.

Ravee v. *Farmer*. 4 T. R. 146

9. The submission being of *all matters* in difference, an award of so much to be paid by the defendant to the plaintiff on their banking account, and for which sum the plaintiffs were to give the defendant a release, is binding between them; for no other matter in difference between them can be intended unless it be shewn.

Ingram & al. v. *Milnes*. 8 E. R. 445

10. Two several tenants of a farm agreed with the succeeding tenant to refer certain matters in difference respecting the farm to arbitration, and *jointly and severally* promised to perform the award; the arbitrator awarded each of the two to pay a certain sum to the third: held that they were jointly responsible for the sum awarded to be paid by each.

Mansell v. *Burredge*. 7 T. R. 352

11. Where the lessor of the plaintiff and the defendant in ejectment had before referred their right to the land to an arbitrator, who had awarded in favour of the lessor, the award concludes the defendant from disputing the lessor's title in an action of ejectment.

Doe d. Morris v. *Prosser*. 3 E. R. 15

12. Where parties by bond agreed to submit matters in difference between them to arbitration, and that the submission should be made a rule of court, it is competent to either, even since the stat. 9 and 10 *W.* 3. *c.* 15. to revoke by deed his submission at any time before such submission shall be made a rule of court; and he is not liable to an attachment for contempt of court in not obeying an award which had been

made by the arbitrators after their having received notice of such deed of revocation.

Milne & al. v. *Gratrix.* 7 E. R. 608

II. *Arbitrator and Umpire, Power of; and Validity of Awards.*

1. The Court of K. B. said, that an arbitrator may award costs without any express authority for that purpose.

Roe d. Wood v. *Doe.* 2 T.R, 644

2. But the Court of C. P. held that the general term *costs* in a rule of reference did not include the costs in that reference. *Bradley* v. *Tunstow.* 1 B. & P. 34 (And see *Willes's Rep.* 64.)

3. The Court of C. P. held that an award of costs sustained in the action, did not include the costs of the reference.

Browne v. *Marsden.* 1 H. B. 223

4. Upon a submission by bond of all matters in difference between the parties in a cause, without making any mention of costs, the arbitrator has no authority to award costs, as between attorney and client. But the plaintiff waving his costs, and having only demanded the principal sum awarded, took his attachment for that sum.

Whitehead, & al. v. *Firth.* 12 E.R. 165

5. If no directions are given by an arbitrator, respecting the costs of the award, they are to be paid by both parties equally. *Grove* v. *Cox.* 1 W. P. T. 165

6. Arbitrators having power to choose an umpire may elect one immediately previous to entering upon the examination of the matter referred to them. 2 T. R. 644

7. The court of K. B. granted an attachment for non-performance of an award made a rule of court, and would not drive the plaintiff to his action on the bond; upon an affidavit that the arbitrators, after having appointed an umpire who refused to act, appointed another, who accepted the authority, but he being objected to by the defendant, the arbitrators each proposed another, but could not agree on the person to be substituted, and another was not substituted though the respective attornies agreed on a third, in consequence of which the umpire objected to was called on to proceed, and made his award within time.

Oliver v. *Collings.* 11 E. R. 367

8. Assignees of a bankrupt, having received 1500*l.* from a debtor to the bankrupt as a debt due to his estate, and having commenced an action against him for a further demand on the same account, to which he had only pleaded the general issue, agree with him to refer *all matters in difference between the parties in the cause;* the arbitrator has power to award that the assignees shall repay a part of the sum already received, if it appear to have been paid by mistake. 2 T.R. 645

9. The Court of K. B. will not set aside the award of an umpire, because he received the evidence from the arbitrators without examining the witnesses, unless he were requested to re-examine them before the making of his award.

Hall v. *Lawrence.* 4 T. R. 589

10. So the Court of C. P. refused to set aside an award on the ground of the witnesses not having been examined on oath, no objection being made at the time of their examination.

Ridout v. *Pye.* 1 B. & P. 91

11. It is no ground for setting aside an award, that one of the defendant's witnesses was examined by the arbitrator after the evidence was closed on both sides, and the plaintiff's attorney gone; though by a different testimony from what he gave at first the arbitrator's opinion was influenced; unless such re-examination was brought about by the management of the defendant's attorney.

Atkinson v. *Abraham.* 1 B. & P. 175

12. If *A.* and *B.*, in consideration of a sum of money paid by one to the other, enter into partnership, and covenant in case of the dissolution of the partnership, to submit all matters relating thereto to arbitrators, to be chosen by the partners, *one by each;* this does not authorise *the administratrix of one of the partners* to name an arbitrator; nor would it authorise the arbitrators to determine whether any part of that sum should be refunded.

Tattersall v. *Groote.* 2 B. & P. 131

13. Semble no action can be maintained for refusing to nominate an arbitrator, in pursuance of a covenant to refer matters to arbitration. 2 B. & P. 131

14. If a debt, arising out of an *illegal* transaction, due from one of two partners to the other, be referred, together with other causes of dispute, to an arbitrator, who awards a sum due from one partner to the other, ex-

pressly on account of such debt, the court will set aside that part of the award. *Aubert* v. *Maze.* 2 B. & P. 371

15. If an arbitrator profess to decide upon the law and he mistake it, the court will set aside the award, although the arbitrator's reasons do not appear upon the face of the award, but only upon another paper, delivered therewith. So it seems it would be if such reasons appeared in any other authentic manner to the court.

Kent v. *Elstob.* 3 E. R. 18

16. The Court of C. P. refused to set aside an award upon a statement of facts from which it could only be *inferred* that the award was founded upon an incorrect idea of the law of the case.

Delver v. *Barnes.* 1 W. P. T. 48

17. Upon a reference of all actions, controversies, &c. and also of two distinct matters of difference, if the arbitrator omit to decide one of such distinct matters that vitiates the whole award, which cannot therefore be enforced by attachment.

Randall v. *Randall.* 7 E. R. 80

18. Where an award is made after the time originally given to the arbitrators, but authority was given them to enlarge the time, an award within the enlarged time is good, though it do not recite that the arbitrators did enlarge the time. *George* v. *Lousley.* 8 E. R. 13

19. After the delivery of an award the arbitrator cannot, though within the time limited by the submission, correct a mistake in the calculation of figures, by making another award.

Lucine v. *Elnon.* 8 E. R. 54

20. Where the costs of the cause and of the special jury are separately submitted, the arbitrator must distinctly adjudicate upon each, or the award is void. *Ibid.*

21. An award that each party pay his own costs, and that certain actions be *discontinued*, is final and good, being in effect an award of a *stet processus*.

Blanchard v. *Lilly, & R.* v. *Blanchard.* 9 E. R. 497

22. An award directing one of two things to be done in the alternative, is good, if either of them is capable of being performed; and in such case it is incumbent on the party to perform that part which is capable of being carried into execution.

Simmonds v. *Swaine.* 1 W. P. T. 549

III. *Performance; of enforcing, or relieving against.*

(And see ATTACHMENT III. 3. BAIL I. 23).

1. *A.* and *B.* in 1797 assigned to the plaintiff all debts due to them, and gave him a power of attorney to receive and compound for the same; under which the plaintiff in 1799 submitted to arbitration the matters in difference *then* subsisting between his principals and the defendants: and the plaintiff and defendants promised to each other to perform the award. The arbitrators having awarded a sum to be paid to the plaintiff as such attorney, he may maintain an action for it *in his own name.*

Banfill v. *Leigh & al.* 8 T. R. 571

2. An attachment for not paying a sum of money pursuant to an award cannot issue before a personal demand has been made: though the time and place of payment be specified in the award.

Brandon v. *Brandon.* 1 B. & P. 394

3. Upon an application for an attachment for non-performance of an award, it is competent to the parties *to object to the award* for any illegality apparent upon the face of it, though the time for applying to set it aside is expired. *Pedley* v. *Goddard.* 7 T. R. 73

4. But the court will not listen to *an application to set aside an award* for any defect whatsoever, after the time limited by the stat. 9 & 10 *W.* 3. *c.* 15. 7 T. R. 73

5. Though such defect appear upon the face of the award.

Lowndes v. *Lowndes.* 1 E. R. 276

6. The time limited by that statute for setting aside awards, made under submissions by virtue of that statute, does not attach on awards made under orders of *nisi prius.*

Synge Exec. v. *Jervoise.* 8 E. R. 466

7. A party cannot, in shewing cause against an attachment for not performing an award, impeach the award for defects not appearing on it.

Holland v. *Brooks.* 6 T. R. 161

8. A submission to an award between *A.* and *B.* the parties on the record, having been made a rule of court, which award not having been made in time, the dispute had been referred to a second arbitrator to settle by *B.* and *C.* who were the real parties in

the suit, no attachment can issue against *B.* for not obeying the award made by the second arbitrator, because the reference should be made by the parties on the record; and even if it had there should have been another rule to make the second submission a rule of court.

Owen v. *Hurd.* 2 T. R. 643

9. And as the court had no jurisdiction in this case, they could not go into the merits, though *B.* consented to wave the objection. 2 T. R. 645

10. Where in an arbitration-bond the time was limited for the arbitrator to make his award, and the declaration stated that such time was afterwards enlarged by mutual consent, it was held that no action could be maintained on the bond to recover the penalty for not performing the award made after the time first limited. *Brown* v. *Goodman, E.* 29 *G.* 3. 3 T. R. 592, *n.*

11. An agreement to enlarge the time for making an award, must contain a consent that it shall be made a rule of court; otherwise no attachment will be granted for not performing an award made under it. *Jenkins* v. *Law.* 8 T. R. 87 (But see *ante* I. 4.)

12. A motion that an award should be referred back to the same arbitrator to reconsider it, on the ground that he had not sufficient materials before him when he made it, must be made before the last day of the next term after such award made, according to stat. 9 & 10 *W.* 3. *c.* 15. § 2; al. though the arbitrator be not charged with corruption or undue means.

Zackary v. *Shepherd.* 2 T. R. 781

13. An award that the defendant shall pay to the plaintiff such a sum of money unless within twenty-one days (which was after the time limited for making the award) the defendant shall exonerate himself by affidavit from certain payments and receipts, in which case he was only to pay a less sum, is illegal and void, because uncertain and inconclusive. 7 T. R. 73

14. If an award be made on an improper stamp, and no application be made to inforce it, the court will not set it aside.

Preston v, *Eastwood.* 7 T. R. 95

15. An award in writing and under seal need not have a deed stamp, unless *delivered as a deed*; if only delivered *as an award*, it is sufficient that it have the award stamp of 10*s.*

Brown v. *Vauser.* 4 E. R. 584

16. An award which is required to be made in writing, &c. and *ready to be delivered* at such a time, is complete if made in writing and ready to be delivered by the arbitrator within the time, though not actually delivered. 4 E. R. 584

17. The Court of C. P. refused to grant an attachment for non-performance of an award pending an action brought on the award; or to allow the plaintiff to wave the action in order to apply for the attachment.

Badley v. *Loveday.* 1 B. & P. 81

18. That court gave leave in the first instance to enter up judgment on a verdict reduced by award.

Higginson v. *Nesbitt.* 1 B. & P. 97

19. Where a verdict is taken *pro formâ* at the trial for a certain sum, subject to the award of an arbitrator, the sum afterwards awarded is to be taken as if it had been originally found by the jury; and the plaintiff is entitled to enter up judgment for the amount, without first applying to the court for leave so to do. *Lee* v. *Lingard.* 1 E. R. 401. *Grimes* v. *Naish* 1 B. & P. 480. *Borrowdale* v. *Hitchener.* 3 B. & P. 244, *accordante: Hayward* v. *Ribbons.* 4 E. R. 310, *semble contra.*

20. The sum for which the verdict is nominally taken, in such a case, cannot be considered as in the nature of a penalty for which plaintiff may enter up judgment, and thereby levy interest, sheriff's poundage, &c. He can only enter up judgment for the sum found by the arbitrator. 1 E. R. 403. 1 B. & P. 480. 3 B. & P. 244, and 4 E. R. 310, *accord.*

21. If in such case the award be made before the term, the defendant can only impeach it within the four first days of term. 3 B. & P. 244

22. And personal service of the award is not necessary to warrant the issuing of execution, if the attorney of the defendant has been served with the award. 3 B. & P. 244

23. Where a verdict is taken for a certain sum, subject to the award of an arbitrator, he cannot award a *greater* sum than that for which the verdict was taken; and if he do, no assumpsit by implication will arise to pay even to the extent of the verdict so taken.

Bonner v. *Charlton.* 5 E. R. 139

24. But where on such award judgment was entered for the whole, and it appeared that part of the sum was

covered by a countervailing demand which never was in dispute, so that only a balance less than the amount of the verdict was ultimately to be paid over, the Court of C. P. reduced the judgment to the amount of the verdict and granted execution for the sum really due.
Prentice v. *Reed.* 1 W. P. T. 151

IV. *Reference; what may be referred.*

1. Hereafter it is recommended that where the parties intend to refer *all* disputes, the terms of the reference be "of all matters in difference between the parties;" and when the reference is only intended to be of the matter in the particular cause, it be "of all matters in difference in the cause."
Smith v. *Muller.* 3 T. R. 626
2. The Court of K. B. refused to make a submission to an award a rule of court; part of the matter agreed to be referred having been made the subject of an indictment.
Watson v. *M'Cullum.* 8 T. R. 520
3. The court will not presume that matters in difference submitted to arbitration by an assignee of debts (and who was made attorney to receive the same) arose subsequent to the deed under which the assignee was empowered to submit the same; but such matter may be pleaded by way of defence to an action for the money awarded. 8 T. R. 571
4. Where by the rule of reference the costs are to abide the event of an award, that includes the costs of the reference as well as of the cause.
Wood v. *O'Kelly.* 9 E. R. 436

B.

BAIL.

I. *On Arrest, or re-Arrest in* CIVIL CASES.

1. None shall be holden to special bail in *Detinue* or *Trover* without a judge's order. *Reg. Gen.* K. B. *Hil.* 48. *G.* 3. 9. E. R. 325
2. It is generally speaking no objection to bail that they are indemnified.
Neat v. *Allen.* 1 B. & P. 21
3. But the Court of C. P. rejected bail, who had received a verbal promise of indemnity from the defendant's *attorney*; given time to put in fresh bail. *Greenfill* v. *Hopley.* 1 B. & P. 103
4. Neither an attorney nor a clerk to an attorney can be bail to the action *Laing* v. *Cundall,* 1 H. B. 76. Whether the clerk be articled or not.
Cornish v. *Ross.* 2 H. B. 350
5. And though he be not clerk to the defendant's attorney.
Redit v. *Broomhead.* 2 B. & P. 564
6. It is not sufficient ground to reject a person as bail that he is described "of *A.* in the county of *B.*, gaol keeper," for he might be a corporation gaol keeper, and so have nothing to do with the process of the court.
Faulkner v. *Wise.* 2 B. & P. 150
7. If bail be put in without any description, one of whom afterwards proves to be a clerk to an attorney, the plaintiff may treat the bail as a nullity, and take an assignment of the bail-bond.
Fenton v. *Ruggles.* 1 B. & P. 356,
Wallace v. *Arrowsmith.* 2 B. & P. 49
8. In K. B. the plaintiff must except to such bail, and cannot treat it as a nullity. *R.* v. *Sher. Surrey.* 2 E. R. 181
Foxall v. *Bowerman.* 2 E. R. 182
9. An indorser of a bill of exchange may be bail for the drawer in an action against him upon the bill.
Harris v. *Manley.* 2 B. & P. 526
10. A defendant cannot enter into the recognizance of bail: but each of his bail shall bind himself in double the sum sworn to.
Reg. Gen. C. P. *E.* 36 *G.* 3. 1 B. & P. 530
11. Neither the bail to the sheriff, nor a defendant who has given a bail bond, can be held to bail in an action brought by the sheriff on that bond.
Brander & al. v. *Robson.* 6 T. R. 336
Mellish & al. v. *Petherick.* 8 T. R. 450
12. But bail in the original action after judgment recovered against them on the bail bond, may be holden to bail in action on such judgment.
Prendergast v. *Davis & al.* 8 T. R. 85
13. Bail to the sheriff are liable to the plaintiff's *whole* debt (without regard to the sum sworn to) and costs, provided they do not exceed the penalty of the bail bond.
Mitchell v. *Gibbons.* 1 H. B. 76
Stevenson v. *Cameron.* 8 T. R 28
14. And so is the sheriff in the case of an attachment against him for not bringing in the body: for he ought to put the plaintiff in the same situation as if good bail were put in and justified.
Fowlds v. *Mackintosh.* 1 H. B. 235
15. But the court will relieve him on payment of what is due, to the extent

of the penalty in the bail bond, though less than the plaintiff's demand.

R. v. *Sher. Middlesex.* 3 E. R. 604

16. In an action on the recognizance, the court will stay the proceedings against both the bail, on payment of the sum sworn to and costs, though less than the damages recovered, or than the sum named in the process.

Clarke v. *Bradshaw.* 1 E. R. 86

8. P. although it appeared that the defendant, in the original action, was gone abroad. *Tranel* v. *Rivaz*, K. B. T. 16 *G.* 3. 1 E. R. 91, *n.*

17. Where bail is taken under a judge's order (in C. P.) that court, contrary to the practice of K. B. holds each of them liable to double the sum ordered; considering the order as equivalent to the affidavit in other cases.

Dahl v. *Johnson.* 1 B. & P. 205

18. If a defendant be holden to bail under a judge's order, a material fact being concealed from the judge which would probably have induced him to refuse the order; the court will on application discharge the defendant, even though there was a sufficient *affidavit* of debt, independant of the order.

Davis v. *Chippendale.* 1 B. & P. 282

19. But they will not discharge him from a detainer lodged against him by a third person while in custody under the judge's order. 2 B. & P. 282

20. A defendant who has been arrested in a foreign country may be arrested here again for the same cause of action.

Maule v. *Murray.* 7 T. R. 470

21. The Court of C. P. refused to discharge out of custody a defendant holden to bail for a debt contracted in England, on a common appearance, and an affidavit of his having become a bankrupt in *Ireland*, and there obtained his certificate; but put him to plead. *Quin* v. *Keefe.* 2 H. B. 553

23. In general a defendant cannot be held to bail twice for the same cause; but if he be discharged out of custody the first time for some act for which the plaintiff is not answerable *e. g.* an alteration in the warrant to arrest by the sheriff's officer, without the plaintiff's knowledge, in such case the defendant may be again held to bail for the same cause of action.

Housin v. *Barrow.* 6 T. R. 213

23. Aliter, if for default of the plaintiff in not declaring in time, and the second writ be for the same cause of action in substance; though the first affidavit to hold to bail were adapted to a demand in trover for goods, and the second for money had and received, upon a supposition that the goods had been sold by the defendant sor the plaintiff, and the money received to his use. *Imlay* v. *Ellefsen.* 3 E. R. 309

24. A plaintiff having sued out writs of *capias* into two counties and arrested the defendant in both, who gave bail in both, the Court of C. P. directed that the bail first given should stand; the proceedings on the second arrest were set aside, and the plaintiff ordered to pay the costs of those proceedings. *Bullock* v. *Morris.* 2 W. P. T. 67

25. Where a cause, in which the defendant has been holden to bail, is referred to arbitration, and the arbitrator awards to the plaintiff a sum exceeding 10*l.* the defendant may be holden to bail again in an action upon the award. *Collins* v. *Powell.* 2 T. R. 756

26. A defendant arrested, held to bail, and rendered, and afterwards superseded for want of being charged in execution, cannot be held to bail again upon bills of exchange given by him before he was rendered, as a collateral security for the damages and costs recovered against him in the former action, and upon agreement for a stay of execution till default made in payment of the bills.

Daniel v. *Dodd.* 8 E. R. 334

27. A defendant may be held to special bail in an action on a judgment for 10*l.* for damages *and costs*; though the original debt alone were under 10*l.*

Lewis v. *Pottle.* 4 T. R. 570

28. The defendant having been holden to bail, but afterwards discharged on a common appearance, on account of the plaintiff having declared on a different cause of action from that mentioned in the writ and affidavit, the Court of C. P. held that he might be holden to bail again in an action on the judgment.

De-le-Cour v. *Read.* 2 H. B. 278

29. If a defendant, being arrested upon process in *K. B.* give a warrant of attorney to confess judgment, and be afterwards holden to bail in *C. B.* in an action upon that judgment, the court will discharge him upon a common appearance.

Salkeld v. *Lands.* 2 B. & P. 416

30. Where a defendant was arrested on a contract the legality of which was doubtful (under 7 *G.* 1. stat. 1. c. 21.

see AGREEMENTS, II.) and which might eventually subject the plaintiff to a penalty; the Court of C. P. discharged the defendant on entering a common appearance.

Sumner v. *Green.* 1 H. B. 301

31. Where a certificated bankrupt had been holden to bail, for a debt due before his bankruptcy, the Court of C. P. refused to discharge him on entering a common appearance, it appearing that his certificate was obtained by fraud. *Vincent* v. *Brady.* 2 H. B. 1

32. If two actions be brought by the same plaintiff at the same time for causes which may be joined in one action, and the defendant is holden to bail in both, the court will compel the plaintiff to consolidate them, and to pay the costs of the application.

Cecil v. *Briggs.* 2 T. R. 639

33. If the plaintiff hold two defendants to bail on a joint writ, and declare against them severally, the court will set aside the proceedings.

Moss v. *Birch.* 5 T. R. 722

II. *Of the Bail-Bond, and Actions thereon.*

1. It is sufficient to state in the condition the names of the parties, and the time and place of the defendant's appearance: if the cause of action be added, it may be rejected as surplusage.

Owen v. *Nail.* 6 T. R. 702

2. Therefore where under an original writ in a *plea of trespass on the case* on promises, the sheriff took a bail-bond conditioned for the defendant's appearance in a *plea of trespass;* it was held good. 6 T. R. 702

3. A bail-bond given to the sheriff of *Durham* under a writ issued immediately from this court to him is not void; though the Count Palatine might have interposed and claimed his privilege.

Jackson v. *Hunter.* 6 T. R. 71

4. If it appear in a declaration by the assignee of the sheriff on a bail-bond, that the bond is void by the provisions of the statute 23 *H.* 6. *c* 9 the court on motion will arrest the judgment, after verdict, against the defendant, upon a plea of *non est factum.* 2 T. R. 569

5. If a declaration on a bail-bond conclude, "whereby an action hath accrued to the plaintiff to demand and have of the *principal,*" (instead of the bail), and state non-payment by the *principal;* it is bad on a special demurrer. *Morgan, Assignee of Sheriff,* v. *Sargent, one, &c.* 1 B. & P. 58

6. A sheriff's bond, stated to have been taken on the 4th *November, conditioned for the defendant's appearance on the morrow of* All Souls, [*scil,* 3d. *Nov.*] is void by the statute. 2 T. R. 569

7. The court refused to order a bail-bond, given on an arrest in a penal action, to be cancelled on an affidavit of the defendant that he was not the person who had incurred the penalty; and they left him to his plea in abatement.

Salter q. t. v. *Shergold.* 3 T. R. 572

8. The court will not set aside proceedings, and order the bail-bond to be delivered up, because a defendant has been arrested on a special *capias,* in which, as well as in the affidavit to hold to bail the initials only of his christian name were inserted.

Howell v. *Coleman.* 2 B. & P. 466 (And see AMENDMENT II. 9.)

9. The Court of C. P. held, that the *sheriff* might sue on a bail-bond in a different court from that in which the original action was brought.

Newman & al. v. *Faucitt.* 1 H. B. 631

10. But the Court of K. B. held, that an action on a bail bond, by the officer to whom the bond was given, must be brought in the court where the original action was brought.

Donatty v. *Barclay.* 8 T. R. 152

11. Where a judgment against the principal is set aside, upon condition that the bail-bond shall stand as a security, the bail, if sued upon the bond, are entitled to a rule to plead, and a demand of plea, before judgment can be signed against them.

Evans v. *Surman.* N. R. 63

12. Final judgment may be entered in an action on a bail-bond without a writ of inquiry.

Moody v. *Pheasant.* 2 B. & P. 446

13. Though the proceedings against the bail should be such as cannot be set aside *on the ground of irregularity,* yet the court, if the bail apply to *their equitable jurisdiction,* will in all cases stay proceedings on the bail-bond, where the plaintiffs, by their neglect, have forfeited their claim to institute proceedings against the bail.

Pigott v. *Truste.* 3 B. & P. 221

14. When the bail apply to stay proceedings upon the bail-bond, or against

the sheriff, they need not swear to merits, though a trial has been lost.

Hardisty v. *Storer*. N. R. 123

15. Where two only of three joint contractors are sued, the court will not stay proceedings on the bail-bond, unless the defendants will undertake not to plead in abatement.

Govett v. *Johnson*. 2 B. & P. 465

16. If after a *procedendo* to carry back a cause to an inferior court; the plaintiff recover, and then sue out a *scire facias* against the bail below and they remove the proceedings against them into the Court of K. B. by *habeas corpus*, that court will award a *procedendo* in the suit against the bail.

Dixon v. *Heslop & al.* 6 T. R. 365

17. No bail-bond taken in *London* or *Middlesex* under process returnable in C. P. on the first return of a term, shall be put in suit until after the 5th day nor bonds taken elsewhere until after the 9th day in full term: nor if under process returnable on subsequent returns, until after four days and eight days respectively, exclusive of the return day of the process. *Reg. Gen. C. P. T.* 30 *G.* 3. 1 H. B. 525, 6

18. After default made in not putting in special bail in time, it is not enough that bail are afterwards *put in:* but the plaintiff may take an assignment of the bail bond and proceed thereon, unless the bail be also *justified* though not before excepted to.

Turner v. *Cary & al.* 7 E. R. 607

19. Bail above having been put in and exception entered in the vacation, notice of justification for the first day of the next term must be given within four days after such exception; and such notice not having been given the bail-bond may be assigned, and the bail be proceeded against.

Millson v. *King*. 9 E. R. 434

20. To debt on a bail-bond it is no good plea that the action was brought by the sheriff for the benefit of, and as trustee for, the sheriff's officer who arrested the defendant, and to whom the defendant paid the debt and costs, and who accepted the money so paid by the defendant in full satisfaction of the bond and fees; and that if any damage afterwards accrued by default of defendant's appearance according to the condition of the bond, it was occasioned by the sheriff's officer not paying over the debt and costs to the plaintiff in the original action, *which would have been accepted by such plaintiff:* For the officer had no interest in the bond at the time of the supposed satisfaction received by him.

Scholey & al. v *Mearns*. 7 E. R. 147

21. The Court of C P. held that if bail enter into a recognizance, although they are excepted to and never justify, they still remain liable.

Bramwell v. *Farmer*, 1 W. P. T. 427

But see *post* VI.

22. Where the defendant in the action gave a cognovit for the debt and costs payable by seven instalments; and after the bail were fixed an act passed for discharging insolvent debtors in custody for debts due at a certain day, prior to the bail being fixed, at which day three only of the instalments were payable; and afterwards the principal was discharged under the act, when only two more of the instalments had become payable: yet held that the bail were liable for the whole condemnation-money; the entire debt, quà debt, being due instanter, with a stay of execution only for certain portions at certain times.

Shakespeare v. *Phillips*. 8 E. R. 433

III. *Scire Facias, or other Proceedings against Bail.*

1. Where there is only one *scire facias* against bail, and the proceedings are by bill, there need be only four days exclusive between the teste and return of it. *Bell* v. *Jackson*. 4 T. R. 663

2. Where the defendant was sued by original in *London*, the *scire facias* against the bail must be sued there also; and it does not help the plaintiff who sued out the *scire facias* in *Middlesex*, that bail had by mistake been put in there. *Harris* v. *Calvart*. 1 E. R. 605

3. The *scire facias* against bail must lie four days in the office, as well where *scire feci* is returned as *nihil*.

Williams v. *Mason*, *M.* 4 *G.* 2. 1 E. R. 89, n

4. If the second writ of *scire facias* be in proper time on the file in the sheriff's office, that is sufficient to warrant proceedings against the bail, though it were not entered in the *scire facias* book in the sheriff's office, which is merely a private book for his own convenience.

Heywood v. *Renaard*. 3 E. R. 570

5. The court set aside the proceedings in *scire facias* against bail, because they were summoned only an hour before the court rose on the return-day. (*But*

see post 7.) And the sheriff's return of *scire feci* does not estop the bail from shewing that they were summoned so late on the return-day, that they could not bring in their principal before the rising of the court.

Webb v. *Harvey*. 2 T. R. 757
Pool v. *Wills*. K. B. *E.* 16 *G.* 3. 2 T. R. 758, *n.*

6. But by the settled practice of the court, it is sufficient if the bail be summoned *any time* before the rising of the court on the return day.

Clark v. *Bradshaw*. 1 E. R. 86

7. And there is a mistake in the report of the case of *Webb* v. *Harvey* (see 5. *ante*) in stating the notice to the bail to have been *before*, as in fact it was not served till *after*, the rising of the court. 1 E. R. 88, 9

8. The plaintiff may sue out a writ against the bill on their recognizance, on the return-day of the *ca. sa.* against the principal.

Shivers v. *Brooke*. 8 T. R. 628

9. The Court of C. P. set aside proceedings against bail, because the *ca. sa.* was tested of a term prior to that in which judgment was signed against the principal. *Gawler* v. *Jolly*. 1 H. B. 74

10. But it is immaterial the *capias ad respondendum* against the bail being *tested* of a day prior to the return of the *ca. sa.* against the principal, if in fact it be not sued out till after.

Pinero v. *Wright*. 2 B. & P. 235

11. In the Court of C. P. no *ca. sa.* lies on a judgment on a *sci. fa.* against bail; for in that court the bail only undertake that the condemnation-money may be levied of their goods, &c. and the execution is always *elegit*, or *fi. fa.* The practice is otherwise in K. B. where a *ca. sa.* is permitted.

Troughton v. *Clarke & al.* W. P. T. 113

IV. *Surrender of Principal.*

1. Bail may render the principal before the return of a rule against the sheriff to bring in the body, before they have justified, giving notice of such surrender to the plaintiff's attorney.

Reg. Gen. K. B. T. 33 *G.* 3. 5 T. R. 638
(See *Hall* v. *Walker*. 1 H. B 368

2. So they may render the principal after an assignment of the bail-bond, though they have not justified.

Edwin v. *Allen*. 5 T. R 401

3. Bail sued on their recognizance by attachment of privilege, may render the principal on the appearance day of the return.

Fletcher v. *Aingell*. 2 H. B. 117

But the surrender must be before the rising of the court.

Lardner v. *Bassage*. 2 H. B. 593

4. The court will not enlarge the time for bail to render their principal, on the ground that he could not be removed without endangering his life.

Wynn v. *Petty*. 4 E. R. 102
Nightingale v. *Lowry*. K. B. *E.* 19 *G.* 3 cited. 4 E. R. 102

5. Nor on the ground of the unwarrantable arrest and detention of the principal by a foreign enemy.

Grant v. *Fagan*. 4 E. R. 189

6. For the bail are not excused from the performance of the condition of the bond, merely because the render has become impossible without any default of theirs; but only when it has become so, by the act or law of our own state. 4 E. R. 190

7. But it seems the court would enlarge the time of render, in order that the examination of the principal, a bankrupt, might be previously completed: no prejudice ensuing therefrom to the plaintiff. *Maude* v. *Jowett* 3 E. R. 145
(See same point, *Glendining* v. *Robinson*. 1 W. P. R. 320

8. Proceedings may be stayed on a bail-bond, on payment of costs, though the bail surrender the principal without having justified.

Meysey v. *Carnell*. 5 T. R. 534

9. Bail who are excepted to, and do not justify on the day appointed, cannot afterwards surrender the principal, being thereby out of court; but the defendant being in point of fact, in custody before the assignment of the bail-bond, the Court of K. B set aside proceedings on payment of costs,

Hardwick v. *Bluck*. 7 T. R. 297

10. But the Court of C. P. has since held that bail may render the principal, after having failed to justify on the day for which notice of justification has been given: and if they do surrender the principal, and the plaintiff after notice thereof take an assignment of the bail-bond and proceed thereon, the court will set aside the proceedings with the costs of the assignment.

Seaver v. *Spraggon*. 2 N. R. 85

11. If the principal be surrendered in time, though the bail omit to give regular notice of it to the plaintiff,

in consequence of which he proceeds upon the bail-bond, the bail may apply to set aside the proceedings on payment of costs even after execution levied, and the money is in the sheriff's hands.

Lepine & al. v. *Barratt.* 8 T. R. 222

12. If *A.* being arrested by *B.* on process of C. P. gave bail to the sheriff, and before the return of the writ being again arrested by *C.* is committed to the Fleet prison, after which *B.* takes an assignment of the bail-bond, and proceeds thereon, the court will stay such proceedings; but will not make *B.* pay costs, for they will not try upon affidavit whether he knew or not that *A.* was in custody, but will consider him ignorant of that fact, unless notice of surrender has been regularly given

Harden v. *Hennem.* 3 B. & P. 230

13. If on exception to bail notice be given of other bail; only one of whom justifies, and the names of the former still remain on the bail-piece, such former may surrender the principal.

R. v. *the Sheriff of Essex.* 5 T. R. 633

14. So the Court of K. B. held that though one bail only had justified, and time had been refused to justify another, they may competent to surrender, *Anonymous*, K. B. *E.* 40. *G.* 3. N. R. 138, *n.*

15. And that even bail rejected while on the bail piece are competent to surrender. *Ibid.*

16. But the Court of C. P. held that bail rejected are no bail, and cannot surrender. *Mills* v. *Head.* N. R. 137

17. If the defendant, who has given a bail-bond, surrender himself to the sheriff before the return of the writ, the bail-bond may be given up, and it will be considered as if no such bond had been given.

Jones v. *Lander.* 6 T. R. 753

18. But he must give notice of such surrender, *Maddocks & al.* v. *Bullcock.* 1 B. & P. 325

19. And it is optional with the sheriff whether or not he will accept the surrender, in discharge of the bail-bond, before the return of the writ. 1 E. R. 383

20. Where a plaintiff being arrested, has remained some time in custody, and then a bail-bond has been taken, it may be cancelled, if the defendant return into the sheriff's custody before the return of the writ.

Stamper v *Millbourne.* 7 T. R. 122

21. Bail above may be put in, and the principal be surrendered *before* the return of the writ, and the plaintiff cannot afterwards proceed on the bail-bond.

Hyde v. *Whiskard.* 8 T. R. 456

But see *Huggins* v. *Bambridge*, and *Newton* v. *Lewis.* 8 T. R. 457, 8, *n.*

22. The principal surrendered to the gaoler at the county gaol, in discharge of his bail to the sheriff, before 12 o'clock on the first day of term, being the return-day of the writ, and the under-sheriff signified his assent to the surrender by return of post the next day, at the distance of 17 miles; the plaintiff having afterwards taken an assignment, with notice of such surrender and having commenced the proceedings against the bail, the court of K. B. ordered the proceedings on the bail-bond to be stayed.

Plimpton v. *Howell.* 10 E. R. 100

23. The court, on the application of the defendant's bail, granted a *habeas corpus* to the sheriff of *H.* in whose custody the defendant was under a charge of felony, to bring him up, in order that he might be surrendered by his bail.

Sharp v. *Sheriff* 7 T. R. 226

24. A lunatic may be brought up by *habeas corpus* from *St. Luke's* hospital to be surrendered in discharge of his bail.

Pillop v. *Sexton.* 3 B. & P. 550

25. One, who was committed to *Newgate* by commissioners of a bankrupt, must, for the purpose of being surrendered by his bail in a civil suit, be brought up by *habeas corpus* issued on the crown side of the court, on which side also must be taken the subsequent rule for his surrender in the action, his commitment *pro formâ* to the marshal, and his recommitment to *Newgate*, charged with several matters.

Taylor's case. 3 E. R. 232

26. Bail above may justify the breaking and entering an house (the outer door being open) in which the principal *resides*, in order to *seek* for him, for the purpose of *rendering* him.

Sheers v. *Brooke.* 2 H. B. 120

17. If upon the return of *non est inventus* to the *ca. sa.* the plaintiff proceed against the bail, and deliver a declaration conditionally, the bail cannot apply to the court to stay proceedings, on payment of the debt and costs of the original action only, but must also pay the costs of the second action, though the bail tendered the original

damages and costs before the end of eight days from the return of the *ca. sa.* within which time by the practice of the court they might have discharged themselves by surrendering their principal.

Perigal v. *Mellish.* 5 T. R. 363

28. Where, after due notice of render of the principal, the plaintiff still proceeds against the bail in the action of debt upon the recognizance, because no offer was made by them to pay the costs in the suit against them, nor any rule obtained by them to stay proceedings in the action against them on payment of costs; held the subsequent proceedings irregular, being contrary to the rule of court *Trin.* 1 *Ann.* which says that on such notice of render all further proceedings against the bail shall cease.

Byrne v. *Aguilar.* 3 E. R. 306

29. If proceedings be commenced upon a recognizance of bail immediately upon the return of the *ca. sa.* the Court (C. P.) will not stay them but upon payment of the costs, though the principal be surrendered within the four days allowed by the practice of the court.

Abbott v. *Rawley.* 3 B. & P. 13

0. If an action be brought in K. B. against bail, on a recognizance of bail taken in C. P. they have the same indulgence (of eight days in full term after the return of the writ against them) to render the principal as if the recognizance had been taken in K. B. *Fisher* v. *Branscombe.* 7 T. R. 355

31. In the Court of K. B. the bail have eight days in which to render the principal, from the return of that writ on which there is an effectual proceeding against them.

Wilkinson & al. v. *Vass.* 8 T. R. 422

32. Therefore, where the plaintiff sued the bail on their recognizance who did not render the principal within eight days, and then the plaintiff died (after plea and demurrer in that action) and his executors brought another action against the bail; it was ruled that the bail had eight days from the return of the process in the second action, in which to render the principal. 8 T. R. 422

33. So in the Court of C. P. where bail served with process on his recognizance died before the *quarto die post*, and fresh process issued against his executors, it was held that *they* had until the *quarto die post* of the second writ to surrender the principal. *Meddowscroft* v. *Sutton & al.* 1 B. & P. 61

V. *What else shall discharge the Bail.*

1. A *cognovit* by the principal, without notice to the bail, does not discharge the bail.

Hodgson v. *Nugent.* 5 T. R. 277

2. The court permitted an *exoneretur* to be entered on the bail-piece, the defendant being under sentence of transportation for a felony.

Wood v. *Mitchell.* 6 T. R. 247

3. A seaman being out upon bail on process for a debt under 20*l.* was impressed into the King's service, and as he would have been entitled to his discharge if in custody, by virtue of 32 *G.* 3. *c.* 33. § 22. the court on application of the bail ordered an *exoneretur* to be entered on the bail piece, instead of granting an habeas corpus.

Robertson v. *Patterson.* 7 E. R. 405.

4. The Court of K. B. refused to order an *exoneretur* to be entered on the bail-piece, on the ground that the debt was contracted while the defendant was resident in a foreign country, and before he became a bankrupt by the laws of that country, though he had obtained his certificate there.

Pedder v. *M'Master.* 8 T. R. 609

5. And the court distinguished the above from the case of *Ballantine* v. *Golding*, *M.* 24 *G.* 3. 4 T. R. 185, *n.*) where plaintiff as well as defendant resided in *Ireland* at the time of the defendant's bankruptcy there. 8 T. R. 609 (And see *ante*, DIV. I.)

6. The court will not discharge a defendant on a common appearance, on the ground of his having obtained his certificate as a bankrupt, and the debt being thereby barred, if the validity of the certificate is meant to be disputed.

Stacy v. *Federici.* 2 B. & P. 390 (And see *ante*, I. 28.)

7. Bail cannot plead the bankruptcy and certificate of their principal in their own discharge. *Beddome* v. *Holbrooke*, T. 39 *G.* 3. 1 B. & P. 450, *n. Donnelly* v. *Dunn, ib.* 2 B. & P. 45

8. If the principal die after the return of the *ca. sa.* and before the return be filed, the bail are fixed, and the court will not stay the filing of the return in favour of the bail.

Rawlinson v. *Gunston.* 6 T. R. 284

9. Where the substantive cause of action did not require special bail without

a judge's order, and the plaintiff held the defendant to bail on the money counts and did not recover thereon, the Court of C. P. ordered an *exoneretur* to be entered on the bail-piece.

Caswell v. *Coare.* 2 W. P. T. 107

10. One of two defendants having been holden to bail in Trinity term, the plaintiff proceeded to outlawry against the other, and delivered a declaration against the former on the first day of *Easter* term, not having obtained a rule for time to declare: the Court of C. P. held that the cause was out of court, and the bail entitled to an *exoneretur*. *Sykes* v. *Bauwens.* 2 N. R. 404

VI. *Writ of Error; its Effects as they relate to the Bail; and of Bail on.*

1. Where a *ca. sa.* is returnable against the principal on a particular day, before which a writ of error is allowed and served; that operates as a *supersedeas* to any proceeding against the bail, though the *ca. sa.* has lain four days in the office before the allowance of the writ of error.

Perry v. *Campbell* 3 T. R. 390

2. A writ of error allowed is a *supersedeas* in law to all further proceedings in the court below; and therefore proceedings were set aside with costs for irregularity where the *ca. sa.* was returned after notice of such allowance though on the same day, and *sci. fa.* afterwards taken out against the bail. *Miller* v. *Newbald.* 1 E. R. 662

3. A writ of error, though not returned, is of itself a *supersedeas;* and may be pleaded by the bail to have been issued and allowed after the issuing and before the return of the *ca. sa.* against the principal, so as to avoid proceedings against them in *scire facias* upon the recognizance of bail prosecuted after a return by the sheriff of *non est inventus* made pending such writ of error. *Sampson* v. *Bryan.* 2 E. R. 439

4. Upon a writ of error sued out by the principal after the bail are fixed, and proceedings against them in *scire facias*, the court will only stay proceedings against the bail pending the writ of error on the terms of the bail's undertaking to pay the condemnation money, and the costs of the *scire facias*, and (if it be a case in which there is no bail in error) to pay the costs also of the writ of error judgment should be affirmed.

Buchannan v. *Alders & al.* 3 E. R. 546

5. On the *quarto die post* of the return of the *ca. sa.* against the principal the bail are fixed; and if after that time they apply to stay proceedings against themselves pending a writ of error, the Court (C. P.) will only grant the application on their undertaking to pay the condemnation money, and the costs of the action against themselves, of the application, and (where there is no bail in error) of the proceedings in error. *Copous* v. *Blyton.* N. R. 67

6. Where a writ of error is allowed before the expiration of the time permitted to the bail to render their principal, the bail are entitled to stay the proceedings against them pending the writ of error, on the terms of undertaking to pay the damages recovered, *or* to surrender the defendant within four days of the determination of the writ, if determined in favour of the original plaintiff.

Sprang v. *Monprivatt.* 11 E. R. 316

7. The bail to the action are not liable to pay the costs of a writ of error.

Yates v. *Doughan.* 6 T. R, 288

8. The same persons who were bail in the Court of B. R. may justify again as bail upon a writ of error returnable in parliament.

Martin v. *Justice.* 8 T. R. 689

9. A recognizance entered into by the bail in error without the principal is good. *Dixon* v. *Dixon.* 2 B. & P. 443

10. If on a bond debt, double the sum secured by the bond be the sum for which the bail bind themselves in the recognizance in error, it is sufficient, though a further sum be due for interest and costs, and nominal damages have been recovered. 2 B. & P. 443

11. Bail in error must be put in within four days after final judgment signed, without reference to the time of the allowance, or serving the copy of it.

Jaques v. *Nixon.* 1 T. R. 279

12. A defendant has four clear days after final judgment to put in bail in error.

Bennett v. *Nichols.* 6 T. R. 121

13. It is not necessary under stat 3 *Jac.* 1. *c.* 8. to give bail in error on a judgment, though in *debt*, for goods sold and delivered, and on an account stated. *Alexander* v. *Biss.* 7 T. R. 449

14. Though such judgment were by default. *Ablett* v. *Ellis.* 1 B. & P. 249

15. Nor on such judgment on a count on a promissory note.

Trier v. *Bridgman.* 2 E. R. 359

16. To bring a case within the statute,

the court must see distinctly that a specific contract has been entered into.
1 B. & P. 249

17. The statute should be construed liberally. 1 B. & P. 249

18. The Court of K. B. held that bail in error was not necessary upon this statute, 3 *Jac.* 1. in debt on bond, conditioned for the payment of money, and also for performing all covenants in a mortgage deed.
Butler v. *Brushfield*. 10 E. R. 407

19. If there be one count in the declaration for which debt would not lie at the time of making stat. 3 *Jac.* 1. *c.* 8. no bail in error is required. 2 E. R. 860
Webb v. *Geddes*. 1 W. P. T. 540

20. Where a writ of error is brought upon a judgment on demurrer in the case of a *scire facias* sued out pursuant to the statute 8 and 9 *W.* 3. *c.* 11. § 8. Bail in error is not required.
Sparks v. *O'Kelly*. 1 W. P. T. 168

21. As the bail in error cannot surrender the principal, they are not entitled to relief, though the principal become a bankrupt pending the writ of error.
Southcoat v. *Braithwaite*. 1 T. R. 624

22. If a defendant in error, on judgment being affirmed, take in execution the body of the plaintiff in error, for debt, damages, and costs in error, he does not thereby discharge the bail in error, but may sue them on their recognizance. *Perkins* v. *Petit*. 2 B. & P. 446

23. Bail in error, who were excepted to and did not justify, were relieved from proceedings against them, though no other bail had been put in; but they were made to pay the costs to the time, the plaintiff having been induced by former cases to proceed against them.
Gould & al. v. *Holmstrom*. 7 E. R. 580
But see *ante*, DIV. II.

VII. *Bail in Criminal Cases.*

1. Upon articles of the peace being exhibited, the court may require bail for such a length of time as they shall think necessary for the preservation of the peace, and are not confined to a twelvemonth.
R. v. *Bowes*. 1 T. R. 696

2. Where the court had at first required bail for fourteen years, they afterwards lessened the time to two years on its appearing to them that an information was depending against the defendant on the same account, which must necessarily be determined within that time. 1 T. R. 696

3. Although it be not necessary to state, in a warrant of commitment for felony, that the act was done *feloniously*; yet unless it sufficiently appear to the court that a felony has been committed, they are bound to bail the defendant. *R.* v. *Judd*. 2 T. R. 255

4. Though a warrant of commitment for felony be informal, yet if the *corpus delicti* appear in the depositions returned to the court, they will not bail, but remand the prisoner.
R. v. *Marks*. 3 E. R. 157

5. The court have a right to bail the accused in all cases of felony, even of murder, if they see occasion, where there is any doubt either on the law or fact of the case. 3 E. R. 163, 4, 5

6. When the House of Lords adjudge that any matter is a breach of privilege, their adjudication on the party accused is a conviction, and no court can bail him. *R.* v. *Flower*. 8 T. R. 314

7. A commitment by a justice of peace for 14 days, under the vagrant act 17 *G.* 2. *c.* 5. is a commitment in execution, and the party is not entitled to be bailed. *R.* v. *Brooke*. 2 T. R. 190

8. The sheriff has no authority to take a *bond* for the appearance of persons arrested by him under process issuing upon an indictment at the quarter sessions for a misdemeanor; he can only take a *recognizance* for their appearance.
Bengough v. *Rossiter*. 4 T. R. 505
(Affirmed in *Cam. Scac. Eyre* C. J. of C. B. *dissent*. 2 H. B. 418

9. At common law the sheriff could not bail any persons indicted before justices of the peace, though he might bail those indicted before him at his torn. Stat. 23 *H.* 6. *c.* 9. was passed to compel him to take bail where he might have done, and neglected to do so. But stat. 1 *Ed.* 4. *c.* 2. takes away his power of bailing altogether, and requires him to return all indictments, taken before him at his torn, to the justices at the next sessions. 4 T. R. 505

10. (But see *contrà* the opinion of *Eyre* C. J. of C. P. 2 H. B. 426.—435. who allowed however that the practice of bailing by the sheriff in such cases had been long discontinued.)

11. An action on the case on stat. 23 *H.* 6. *c.* 9. will not lie against a sheriff for *refusing to take bail* on an *attachment* out of *chancery*; that statute referring only to process in courts of common law. *Studd* v. *Acton*. 1 H. B. 466

BAKER.

1. The stat. 29 *Car.* 2. *c.* 7. does not prohibit a baker baking dinners for his customers on a *Sunday*.
R. v. *J. Younger.* 5 T. R. 449
2. Though baking bread in the ordinary course of the baker's business is an offence within that act. 5 T. R. 451
(See *stat.* 34 *G.* 3. *c.* 61.)
3. It is an offence within the *stat.* 40 *G.* 3. *c.* 18. to sell, by wholesale, bread before it has been baked 24 hours: even though the seller give directions to the person to whom he sells it, not to sell it by retail until the expiration of the 24 hours.
R. v. *J. Smith.* 8 T. R. 588
4. The crown, by letters patent granted to the master and wardens of the corporation of bakers (there being four wardens), by themselves and their deputy or deputies full power to overlook and correct the trade of baking: held that the master and one warden could not justify entering the house of a baker to overlook bread; for if they acted as principals, they did not amount to a majority of persons to whom the power was given; and if they acted as deputies, they were bound to shew that they were appointed by the majority.
Cook v. *Loveland.* 2 B. & P. 31
5. *Qu.* Whether an authority to enter the house of a person of a particular trade, be incident to an authority given by charter to overlook and correct that trade? and *Qu.* whether the crown have power to grant such authority. 2 B. & P. 33

BANKRUPT.

I. *Act of Bankruptcy; what shall be; and its Effects by Relation.*

1. Where an act is a clear unequivocal act of bankruptcy, it cannot be explained by any subsequent circumstances. *Colkett* v. *Freeman.* 2 T. R. 59
2. Therefore where *A.* was denied in the morning by express orders to the holder of a bill which was due, it was a complete act of bankruptcy, though he afterwards paid the bill, before five o'clock in the same day, and though by the custom of merchants in *London* the payer of a bill has the whole day on which a bill becomes due, till five o'clock, to discharge it. 2 T. R. 59
3. But where the act is in itself doubtful, it may be explained. 2 T. R. 59
4. A bill having become due, and the drawer, being pressed for payment, desired the holder to call upon him the next morning at a friend's house and he would pay him, the holder went accordingly, and was denied at the drawer's request: upon being asked by his friend if he was aware that he had committed an act of bankruptcy, he answered with surprise in the negative, and said he did not mean to do so, and went afterwards and paid the bill. Lord *Mansfield* told the jury that if they were satisfied that the denial had been with a view to delay the credit at the time, it was an act of bankruptcy; and if so, it could not be purged by paying the bill afterwards. 2 T. R. 59
5. To make a denial to a creditor an act of bankruptcy, the debtor *must be denied* with intent to defraud or hinder that creditor.
Garret v. *Moule.* 5 T. R. 575
6. "Keeping house," with that intent is not alone sufficient. 5 T. R. 575
7. If a trader gives a general order to be denied, and is denied to a particular creditor, it is such a beginning to keep house as will constitute an act of bankruptcy: although the trader immediately overtakes the creditor and says he was not afraid of him, but of another creditor.
Mucklow v. *Mayl.* W. P. T. 479
8. A declaration by a bankrupt of his motives for absenting himself from his home, made at the time, is evidence in an action by the assignees against a creditor of the bankrupt, in order to prove the act of bankruptcy.
Bateman v. *Bailey.* 5 T. R. 512
9. In order to constitute an act of bankruptcy by a trader in departing from his dwelling-house, it is not alone sufficient that a creditor should be thereby delayed, but the departure must also have been with that intent. The word "*or*" in the stat. 1 *Jac.* 1. *c.* 15. must be read "*and.*"
Fowler v. *Padget.* 7 T. R. 509
10. But the Court of K. B. have now decided that the departure of a creditor from his house *with an intent* to delay his creditors, is an act of bankruptcy, though no creditor be thereby *in fact* delayed.
Robertson v. *Liddell, Bart.* 9 E. R. 487

11. It is not sufficient to constitute such an act of bankruptcy that a sheriff's officer who comes to levy a *fi. fa.* on the trader's effects, is refused admittance after the trader has left his house. *Barnard* v. *Vaughan & al.* 8 T. R. 149

12. A Trader who has no settled house or counting-house, but takes up a temporary abode at a public-house in the place to which his business carries him, commits an act of bankruptcy by departing from such public-house with intent to delay his creditors. *Holroyd & al.* v. *Gwynne.* 2 W.P.T.176

13. A Trader, whose house of trade was in *Ireland* (but who had also a house in *London* where his wife and family resided) having come to *England* to settle his affairs, being informed that one of his creditors intended to arrest him, quitted *England*, and went over to *Ireland* in order to avoid such arrest: the Court of K. B. held that this was a departing the realm with intent to delay his creditors, sufficient to constitute an act of bankruptcy. *Williams* v. *Nunn.* 1 W. P. T. 270

14. An assignment by deed by traders of all their effects, unless all their creditors concur, is an act of bankruptcy. 8 T. R. 142

15. So is such an assignment when made by partners, unless all the separate creditors of each concur, as well as the joint creditors. 8 T. R. 142

16. But an assignment by a person residing in *India*, and trading there, and drawing bills on *England*, of all his effects in trust for creditors, in certain proportions, executed by him while resident in *India*, is not an act of bankruptcy. *Inglis* v. *Grant.* 5 T. R. 530

17. Neither is such an assignment fraudulent and void in itself; being intended honestly at the time, and assented to by the generality of the creditors. 5 T. R. 530

18. Neither can the assignment of the bankrupt's effects by the commissioners be considered tantamount to a revocation of the trust-deed by the bankrupt himself, under a clause in such deed which empowered him to vacate the instrument, if any creditor to a certain amount refused to subscribe it. 5 T. R. 530

19. Those who are privies, and assent to a deed of assignment by a debtor, cannot set it up as an act of bankruptcy. *Bamford* v. *Baron. E.* 28 *G.* 3. 2 T. R. 594, *n.*

20. But such estoppel, it seems, applies only to the petitioning creditor. 4 E. R. 235, 6

21. Therefore if a commission be sued out on such a deed upon the petition of a creditor who had not concurred in it, and who, together with others who had concurred, was chosen an assignee; it is no objection to an action brought by them as assignees, that some of them had concurred in such deed. *Tappendal & al. (Assignees)* v. *Burges.* 4 E. R. 230

22. A deed, whereby a bankrupt conveys *all* his property in trust to be divided amongst his creditors, is an act of bankruptcy; though the creditors with whom such deed was in the first instance concerted, afterwards and when it was executed, changed their purpose unknown to the bankrupt, and intended to set it up as an act of bankruptcy. And such deed is operative though it contain a proviso to be void if the trustees think fit. 4 E. R. 230

23. Where a trader becomes a bankrupt by lying in prison two months, the act of bankruptcy relates back to the arrest, so as to vest his property in the assignees from that time. *King* v. *Leith.* 2 T. R. 141

24. But no commission can be issued on such act of bankruptcy until the expiration of the two months. *Gordon & al.* v. *Wilkinson.* 8 T.R.507

25. The day of the arrest is to be reckoned the first of the two months. *Glassington* v. *Rowlins.* 3 E. R. 407

26. *L.* bought some tobacco of the plaintiff, to be paid for in ready money, and the same day absconded, to avoid his creditors, leaving orders at his house to receive the tobacco; the plaintiff's servant afterwards brought the tobacco to *L.*'s house without demanding the money: held that the bankruptcy between the sale and delivery did not avoid the sale, so as that the plaintiff could recover back the possession of the goods from the assignees in trover. *Haswell & al.* v. *Hunt & al. Assignees. G. H. E.* 12 *G.* 1. cited. 5 T. R. 231

27. *A.* sold goods to *B.* for which the latter was to pay by a bill at three months; *B.* gave *A.* a check on his bankers (who were also the bankers of *A.*) requiring them to pay *A.* on demand in a bill at three months; *A.* paid the check into the bankers, and took no bill from them; but the amount was transferred in the bank-

ers' books from *B.*'s account to *A.*'s, with the knowledge of both; the bankers failed before the check became due; and it was held that *A.* could not recover the value of the goods against *B.*

Bolton v. *Richard.* 6 T. R. 139

28. *A.* lent his acceptances to the defendant before his bankruptcy, but they were not paid until afterwards: held that *A.* might maintain an action against the defendant, for money paid to his use, notwithstanding his bankruptcy and certificate, and notwithstanding the defendant, before his bankruptcy, gave his receipt to *A.* acknowledging so much money as the acceptances amounted to.

Snaith v. *Gale.* 7 T. R. 364

(See *post.* DIV. IV. V.)

II. *Assignees; what vests in them; and of Actions by them.*

1. By the assignment under the commission, all the bankrupt's property, whether abroad or at home passes.

Hunter v. *Potts.* 4 T. R. 182

2. And his after-acquired personal property and debts pass in like manner by such assignment.

Kitchin v. *Bartsich.* 7 E. R. 53

3. The Court of K. B. held, that if after the assignment of a bankrupt's estate, a creditor residing in *England* attach the money of the bankrupt abroad, the assignees might recover it in an action for money received to their use. *Hunter* v. *Potts.* 4T. R. 182

4. And the Court of C. P. determined that if after an act of bankruptcy committed, but before an assignment, a creditor of the bankrupt makes an affidavit of a debt in *England*, by virtue of which he attaches, and receives, after the assignment, money so due to the bankrupt abroad, the assignees were entitled to recover in such action.

Sills & al. v. *Worswick.* 1 H. B. 665

5. And this doctrine was established in the Court of Exchequer Chamber, (*Eyre* C. J. *dissent.* against *Rooke* J., *Thompson* B., *Heath* J., *Perryn* B., *Hotham* B., and *Macdonald* Lord Ch. B.,) upon the following case: *A.* a *British* subject, a partner in a house at *Manchester*, residing in *America* for the purpose of collecting the debts of the house, having notice of a commission of bankruptcy being issued against a debtor of the house, instituted a suit against the debtor in the Court of *Pennsylvania*, and attached a debt due to the debtor in the hands of *his* debtor resident in *Pennsylvania*; finally recovered judgment against the garnishee; and received from him the amount of his debt. The Court of K. B. on the authority of *Hunter* v. *Potts*, determined without argument, that the assignees of the bankrupt debtor might maintain their action against *A.* for money had and received to their use; and this judgment was affirmed in the Exchequer Chamber.

Philips & al. v. *Hunter & al.* 2 H. B. 402

6. If any person during a bankrupt's examination take any thing out of his effects, and convert it into money, though for the necessary subsistence of the bankrupt and his family, the assignees may maintain trover against such person. 1 T. R. 157

7. If money received by an overseer of the poor be kept apart from his general property, his assignees under a commission of bankruptcy cannot claim it. *R.* v. *Eggington.* 1 T. R 370

8. If the payee of a bill of exchange, received from a third person as the price of an estate, give time to the drawee on condition that he shall allow interest, and afterwards the drawee discharge the bill, having in the mean time committed an act of bankruptcy; this is not such a payment in the ordinary course of trade as is protected by stat. 19 *G.* 2. *c.* 32.; and the assignees may recover the money from the payee

Vernon v. *Hall.* 2 T. R. 643

9. Money paid by a trader after a secret act of bankruptcy to a carrier for the carriage of goods, may be recovered back in *assumpsit* by the assignees of the bankrupt.

Bradley & al. v. *Clarke.* 5 T. R. 197

10. *A.* having recovered a verdict for a certain sum of money against *B.*, *B.* commits an act of bankruptcy; afterwards *A.* having had no notice of the bankruptcy, gives time to *B.*, and instead of entering up judgment, and suing out execution, takes a bill drawn by *B.* on *C.* at a distant period, for the amount of the sum recovered. This is *not* a payment *protected* by the *stat.* 19 *G.* 2. *c.* 32. *A* therefore remains liable to refund the money received for the bill to the assignees of *B.*

Pinkerton & al. v. *Marshall.* 2 H. B. 334

11. A trader after a secret act of bankruptcy, consigned goods to a factor, who

agreed to advance more money thereon, and accordingly accepted and paid bills drawn on him by the trader; a commission afterwards issued against the trader on such prior act of bankruptcy, after which the factor sold the goods and received the money: held that he was answerable to the assignees for the value of the goods. *Copland & al.* v. *Stein & al.* 8 T. R. 199

12. If a debtor after a secret act of bankruptcy be arrested on a bill of exchange and immediately pay the debt, such payment is protected by 19 *G.* 2. *c.* 32.

Cox & al. v. *Morgan.* 2 B. & P. 398

13. So where the payment was made a few days after the arrest. *Holmes* v. *Wennington.* In the Exchequer. T. 30 *G.* 3. 2 B. & P. 399, *n.*

14. A promissory note, reserving interest half yearly, given by the bankrupt for the balance of an account, consisting, amongst other articles, of *money lent* by the defendant to the bankrupt; such note not being given *in the usual and ordinary course of trade and dealing*, is not protected by the stat 19 *G.* 2. *c.* 32. and therefore the assignees of the bankrupt are entitled to recover back money paid by the bankrupt to the defendant, after an act of bankruptcy unknown to the defendant (though before the date of the commission), which money the defendant had before recovered by judgment against the bankrupt in an action on the note. *Harwood* v. *Lomas.* 11 E. R. 127

15. A creditor for goods sold and delivered to a trader who had committed a secret act of bankruptcy, not being cognizant thereof, attached money of the trader's in the hands of a third person, and recovered judgment for his debt, and received the amount from such third person; a commission afterwards issued: held that this payment was not protected by stat. 19 *G.* 2. *c.* 32. as it could not be said to be in any way a payment made by the bankrupt.

Hovil & al. v. *Browning.* 7 E. R. 154

16. But where a trader indebted to the defendants after a secret act of bankruptcy gives them a new bill in lieu of their former, and gives them besides a collateral security by depositing policies with them, and after notice of a loss upon these policies the broker gives his own acceptance to the defendants which was paid, upon which they deliver up the policies; after which a commission is issued against the trader: held that the assignees of the bankrupt could not recover from the defendant the amount of the broker's acceptance paid to them which was the money of the broker not of the bankrupt; though the broker in settling with the assignees retained the amount of the money so paid by him to the defendants.

Hovil v. *Pack & al.* 7 E. R. 163

17. A trader subsequent to an act of bankruptcy, being arrested and detained in prison at the suit of several creditors, sent for all his creditors but one, and paid their debts in full; but no other circumstance occurred from which it could be presumed that they knew of his bankruptcy or insolvency: held, that such payments were not protected by the statute.

Southey v. *Butler.* 3 B. & P. 237

18. If a trader become a bankrupt between the time of executing a bill of sale of a ship at sea to the defendant, and the time of the defendant's complying with the requisites of the registry acts, though such requisites were completed after the act of bankruptcy, and before the action brought, the property does not pass by the bill of sale; but the assignees of the bankrupt may recover the ship in trover.

Moss v. *Charnock.* 2 E. R. 399

19. A covenant in a charter-party of affreightment, to pay freight and demurrage to the owner for the hire of the vessel, is not transferred to the vendee by a bill of sale of the ship made during the voyage; and such owner afterwards becoming bankrupt, his assignees, under the bankrupt laws, and not the assignees of the ship, by the bankrupt's own conveyance, are entitled to the freight and demurrage due from the freighter upon the charter-party.

Splidt v. *Bowles.* 10 E. R. 279

20. Whether soap and the materials for making soap, which were the property of a bankrupt, can be seized in the hands of the assignees for *penalties* incurred under the excise laws previous to the bankruptcy? *Qu.*

Austin v. *Whitehead.* 6 T. R. 436

21. They may be seized, under such circumstances, for *duties* due before the bankruptcy. 6 T. R. 438

22. If a soap-maker, having incurred a forfeiture for concealing soap contrary to stat. 1 *G.* 1. *st.* 2 *c.* 36. become a

bankrupt, and a provisional assignment of his estate be made, after which the soap is condemned and the bankrupt convicted, and thereupon a warrant issues to levy the penalty *on his goods generally*, such a warrant is bad, and cannot justify a seizure of the soap in the hands of the assignees.

6 T. R. 438

23. *A.* first purchased one and afterwards another parcel of goods of *B.*, each at six months credit; when the first sum became due, *A.* lodged in *B.*'s hands a bill of exchange for a larger amount than the value of the goods in order to pay for them, *B.* engaging to return to *A.* the overplus when the bill should be paid; *B.* received the amount of the bill, and then *A.* became a bankrupt, not having paid for the second parcel of goods: held, in an action brought by *A.*'s assignees for the surplus of the bill, that *B.* might retain it to satisfy his demand on *A.* for the second parcel of goods. *Atkinson & al. Assignees* v. *Elliot & al.* 7 T. R. 378

24. Assignees of a bankrupt may sue both in the *debet* and *detinet*.

Winter v. *Kretchman.* 2 T. R. 46

25. The right to bring a real action (*e. g.* a writ of *entry sur abatement*) passes to the assignees by the usual words of the deed of assignment *Smith & al.* v. *Coffin et Ux.* 2 H. B. 451

26. The plaintiff, after judgment and a writ of error allowed, having become a bankrupt, his assignees cannot sue out a *scire facias* in their own names to compel an assignment of errors, till some judgment be given, and then it must be done immediately after such judgment; but they should have gone on with the writ of error in the bankrupt's name till judgment. *Kretchman* v. *Beyer (in error).* 1 T. R. 463

27. Assignees cannot make themselves parties to the record in an action commenced, &c. by the bankrupt, in any intermediate stage of the proceedings, but it must be immediately after judgment; though an interlocutory judgment is sufficient for that purpose.

1 T. R. 469

28. An order of the Lord Chancellor, made under the stat. 5 *G.* 2. *c.* 30.; upon the petition of creditors, for removing one of several Assignees of a bankrupt's estate, not followed up by any re-assignment or release of such assignee to the remaining assignees, nor by any new assignment of the commissioners under the Lord Chancellor's further order, does not operate to divest the legal estate out of such removed assignee: and consequently he ought to join in an action of trover brought by the assignees for a ship belonging to the bankrupt's estate.

Bloxam & al. v. *Hubbard.* 5 E. R. 407

29. But if he be not joined, advantage can only be taken by plea in abatement to the whole action: though the other assignees who sue can only recover their proportional parts.

30. Trespass will not lie by the assignees of a bankrupt against a sheriff for taking the bankrupt's goods in execution, after an act of bankruptcy, and before the issuing of the commission; notwithstanding he sells them after the issuing of the commission, and after a provisional assignment, and notice from the provisional assignee not to sell: but the assignees may bring trover.

Smith & al. v. *Milles.* 1 T. R. 475

31. If a creditor accompany the sheriff's officer in levying an execution, which is afterwards avoided by a commission of bankruptcy, trover may be maintained against him by the assignees; though the money remain in the hands of the sheriff's broker.

Menham v. *Edmonson.* 1 B. & P. 369

32. The Court of C. P. (*dubitante Eyre* C. J.) held, that the assignees of a bankrupt might recover from the winner, money lost by the bankrupt before his bankruptcy, at play, in an action of debt on *stat.* 9 *Anne, c.* 14.

Brandon v. *Pate.* 2 H. B. 308

33. By stats 1 *Jac.* 1. *c.* 15. § 11. & 12, and 5 *G.* 2. *c.* 30. § 29. after any person has been convicted on an indictment for falsely swearing to a debt under a commissiou of bankrupt, (on which indictment he is to suffer the punishment inflicted by the several statutes against perjury), the assignees of the bankrupt may recover from him double the sum so sworn to *in an action*; in which it is sufficient to state the conviction of the defendant on the indictment, without also alleging that the defendant did take such false oath.

Holmes & al. v. *Walsh.* 7 T. R. 458

34. After an act of bankruptcy committed by one of two partners, joint effects are sent away, which come to the defendant's hands; then the solvent partner dies, leaving the defendant his executor; and afterwards a commission of

bankrupt is taken out against the surviving partner, and his estate assigned to the plaintiffs; held, that they are tenants in common with the solvent partner, and after his decease with his representatives, by relation of law from the act of bankruptcy, and cannot therefore maintain trover against the defendant claiming under such solvent partner. *Smith* v. *Stokes*. 1 E. R. 363

35. After an act of bankruptcy committed by one partner, the other delivers goods of their joint property to a creditor for a joint debt, and dies; afterwards a commission issues against the surviving partner: held, that the creditor, by virtue of such delivery by the solvent partner, became tenant in common of the goods of the assignees of the bankrupt, by relation from the act of bankruptcy, which was in the lifetime of the solvent partner, and consequently that the assignees cannot maintain trover against such creditor. *Smith* v. *Oriell*. 1 E. R. 368

36. *A.* and *B.* being partners in trade, *A.* committed an act of bankruptcy a few days after which *B.* also committed an act of bankruptcy; between these periods a clerk of the house paid to *C.* a creditor 558*l.* and after both acts of bankruptcy 5*l.* more. The assignees, under a joint commission against *A.* and *B.* brought an action against *C.* for these sums, and declared first, for money had and received to the use of *A.* and *D.* before they became bankrupts; secondly, for money had and received to their own use as assignees of *A.* and *B.* after the bankruptcy of both; and third, upon an account stated with them as such assignees: held, that under this declaration they could recover only the 5*l.* *Smith* v. *Goddard*. 3 B. & P. 465

37. *Semb.* That if they had declared for money had and received to their use, as assignees of *A.*, they might have recovered a moiety of the sum paid between the two acts of bankruptcy.

38. A patent right for the exclusive exercise of an invention obtained from the Crown by an uncertificated bankrupt, is affected by the previous assignment of the commissioners, and vests in the assignees. *Hesse* v. *Stevenson*. 3 B. & P. 565

39. And though the assignees execute in their own names a deed with other creditors, whereby they, and all the creditors who may sign the deed, release the bankrupt from all actions, suits, claims, and demands against him or his estate, such deed not being signed by all the creditors, the assignees the benefit of a patent-right afterwards obtained by the bankrupt. 3 B. & P. 565

40. A trader, before marriage, agreed by parol to settle *all his stock* on his intended wife; which, it appeared afterwards amounted then to 450*l.* 3 per cents., but in the marriage-articles it was only stated to be 340*l.* stock; and the deed executed after marriage settled the same sum: this mistake (proved and accounted for) was agreed by the bankrupt, after his bankruptcy, to be rectified by the alteration of the sum in the articles and deed from 340*l.* to 450*l.* stock; which was accordingly done; and the instrument re-executed, with the consent of the bankrupt, his wife, and the trustees: and the whole stock was sold out by the bankrupt *before* his bankruptcy, and the amount paid into the hands of the trustees before such alteration: held, that as one of the parties, (the femme covert, to whom no fraud was imputed), was incapable, by such consent, of exonerating the trustees from the performance of the trust, the trustees who had received such money under the instruments when they existed in a valid form, held it subject to the purpose of of the trust, and not for the benefit of the bankrupt's estate; and that the assignees could only recover from them the surplus beyond the value of the 340*l.* stock: which surplus they were entitled to recover *at law*; the agreement for the settlement *of the whole stock* not being *evidenced by writing before marriage* within the statute of frauds. *Shaw & al.* v. *Jakeman*. 4 E. R. 201

41. Neither the bankrupt, nor any one claiming from him by assignment subsequent to the commission of bankrupt, shall be permitted in an action at law to question the validity of such commission, and recover from the assignees the property of the bankrupt taken under it, by proving an act of bankruptcy committed by the bankrupt prior to the petitioning creditor's debt; though it be also shewn that there was a sufficient petitioning creditor's debt existing at the time of such prior act of bankruptcy, whereon a better commission might have been sued out. *Donovan* v. *Duff*. 9 E. R. 21

42. In covenant by the landlord against the defendants assignees of a bankrupt for breach of covenant, the mere fact that the assignees put the estate up to sale (without *stating* themselves to be the owners or possessed thereof) they never having been in possession of the premises, and there being no bidder, the premises not being sold; is not sufficient to support an averment that all the estate interest, &c. of the bankrupt in the premises *came to the defendant's by assignment.*

Turner v. *Richardson & al.* 7 E. R. 335

43. A new assignee of a bankrupt may sue in debt upon a judgment recovered by a former assignee, displaced by the Lord Chancellor: which judgment was "for damages sustained, for injuries committed as well by the defendant against the bankrupt before his bankruptcy, as also against the assignee, *as such*, after the bankruptcy." For such recovery will be presumed to have been for injuries done to the bankrupt's estate and effects. And the plaintiff may declare in a general form, as having been *duly* constituted and appointed assignee, &c.

De Cosson v. *Vaughan.* 10 E. R. 61

III. *Bankrupt; of his personal Rights and Duties.*

1. A bankrupt is not entitled to any maintenance out of his effects during his examination.

Thompson & al. v. *Councell.* 1 T. R. 157

2. A bankrupt cannot call on his assignees for his allowance under stat. 5 *G.* 2. *c.* 30. § 7. (his estate paying 10*s.* in the pound), if his certificate be not allowed before payment of the dividends.

Groome v. *Potts.* 6 T. R. 548

3. If, upon the examination of a bankrupt touching the disposition of his property, he swear to an account of the same which appears to be incredible, the commissioners may commit him to prison.

Ex parte Nowlan, a bankrupt. 6 T. R. 118

4. In the case of a bankrupt committed by the commissioners for refusing to be examined, he must send word when he will submit and answer the questions. *(Dictum.)* 1 T. R. 654

5. A commitment by the commissioners is a criminal process. 3 E. R. 232

6. If an order for the delivery of goods in the hands of a third person be given to an uncertificated bankrupt, in payment of a debt accrued subsequent to his bankruptcy, he may maintain trover for them.

Fowler v. *Down.* 1 B. & P. 44

7. An uncertificated bankrupt has a right to goods acquired by him since his bankruptcy, against all the world but his assignees, and may maintain trover for them against a stranger.

Webb v. *Fox.* 7 T. R. 391

8. A person attainted of felony under 5 *G.* 2. *c.* 30. § 1. for concealing his personal property from his creditors, cannot be heard by petition to the Lord Chancellor to supersede a commission of bankruptcy issued against him. *R.* v. *Bullock.* 1 W. P. T. 71, 82

IV. *Certificate, of obtaining: and to what Actions, &c. it shall be a bar.*

1. A bond given to a creditor of a bankrupt in order to induce him *to withdraw a petition* which he had preferred to the Chancellor against the allowance of the certificate is void by *stat.* 5 *G.* 2. *c.* 30. § 11.

Sumner v. *Brady & al.* 1 H. B. 647

2. If any one of a bankrupt's creditors, though without the privity of the bankrupt, be induced by money to sign his certificate, it is void.

Holland v. *Palmer.* 1 B. & P. 95

3. Whether bankruptcy is a plea to an action of covenant for rent? *Qu.*

Ludford v. *Barber.* 1 T. R. 86 (See *Auriol* v. *Mills*, tit. COVENANT VI. that it is not.)

4. In the case of the *South-Sea* Company, the act 7 *G.* 1. *c.* 28. by which all their property was taken out of their hands and vested in trustees for the satisfaction of their creditors, was held no bar to an action of covenant. *Hornby* v. *Houlditch.* 1 T. R. 92, 93, *n.*

5. But bankruptcy is a good plea to an action of *debt* on the reddendum in a lease, whether the rent be due before or after the bankruptcy.

Wadham v. *Marlowe, H.* 26 *G.* 3. 1 H. B. 437, *n.* 1 T. R. 91, *n.*

6. An execution against *the goods* of a bankrupt, taken out after his certificate is signed by the creditors, and before it is allowed by the Chancellor, is valid. *Callen* v. *Meyrick.* 1 T. R. 361

7. If a *fi. fa.* issued against a bankrupt before certificate obtained, be not executed till after, the Court (of C. P.) will order the goods to be restored; even though he has not pleaded his certificate according to 5 *G.* 2. *c.* 30. § 7.; for the court will always give

that relief in a summary way, which might be obtained by *audita querelâ*: but if any thing be alleged to invalidate the effect of the certificate, the court will direct a trial on a plea of bankruptcy.

Listerone, &c. v. *Mundell.* 1 B. & P. 427

8. The statute 5 *G.* 2. *c.* 30. only relates to the discharge of the *person* of the bankrupt, who is in custody on a judgment obtained before the allowance of the certificate. 1 T. R. 361

9. A person against whom a second commission of bankrupt has been issued, and who has not paid 15*s.* in the pound, is liable to an action by any of his creditors, notwithstanding they have signed his certificate.

Philpott v. *Corden.* 5 T. R. 287

10. But in such case execution can only issue against his effects, his person being free from arrest; by stat. 5 *G.* 2. c. 30. 5 T. R. 287

11. If a defendant rely on a certificate under a second commission of bankrupt against him under which he has not paid 15*s.* in the pound, the plaintiff, in order to deprive him of the benefit of it, may produce the proceedings under the former commission, and prove that he submitted to it, without proving the trading, act of bankruptcy, and other facts which are necessary to support the commission as against third persons.

Haviland v. *Cook.* 5 T. R. 655

12. An action against a bankrupt, who has obtained his certificate under a second commission, on a cause of action accruing previous to his second bankruptcy, may be maintained before a dividend has been made, or the period for making it allowed by 5 *G.* 2. *c.* 30. § 37. is elapsed; if evidence be adduced to shew that it is not probable from the state of the effects in the hands of the assignees, that the bankrupt will be able to pay 15*s.* in the pound.

Jelfs v. *Ballard.* 1 B. & P. 467

13. A debt which accrued subsequent to an act of bankruptcy, though previous to the issuing of the commission, is not discharged by the certificate.

Bamford v. *Burrell.* 2 B. & P. 1 (*Eyre* C. J. who died after the case was argued, but before the judgment was given, had intimated a contrary opinion.)

14. The same point is considered as clear in *Goddard* v. *Vanderheyden, C. A. M.* 12 *G.* 3. 2 B. & P. 8, *n.*

15. Under the general bankrupt laws debts proveable under the commission, and debts to be discharged by the certificate, are convertible terms. 2 B. & P. 11

16. Debts not due at the time of the act of bankruptcy, except in the cases specially provided for by particular statutes, are not affected by the commission. 2 B. & P. 11

17. The commission and the declaration of the bankruptcy relate to the act of bankruptcy; and when a man is declared a bankrupt, he is so to all intents and purposes, from the time the act of bankruptcy was committed. 2 B. & P. 8

18. A surety, who does not pay the debt of the principal till after his bankruptcy, though called upon and liable to pay it before, may hold the principal to bail, notwithstanding his certificate; for as the debt does not arise till the money is paid, it could not be proved under the commission.

Paul v. *Jones.* 1 T. R. 599

19. *A.* being arrested, *B.* became bail for him to the sheriff, and judgment was obtained against *B.* upon the bail bond; *A.* then became bankrupt, a writ of error at that time depending on the bail-bond, which was afterwards non-prossed; upon this the debt and costs were levied on *B.* by *fi. fa.*, after which *A.* obtained his certificate: held, that *B.* was not barred by the certificate from recovering from *A.* the amount of the debts and costs levied by the *fi. fa.*

Goddard v. *Vanderheyden,* C. P. *M.* 12 *G.* 3. 2 B. & P. 8, *n.*

10. But where *A.* was bound with *B.* as a surety for the payment of a sum certain, and took an absolute bond from *B.* payable the day before the original bond was to become due, and *B.* became a bankrupt before the day of payment; it was held that *A.* might prove this debt under the commission, and that *B.*'s certificate was a bar to an action by *A.* on the counter bond, though *A.* did not pay the original bond till after *B.* had committed an act of bankruptcy.

Martin v. *Court.* 2 T. R. 640 (And see *Toussaint* v. *Martinant,* this *Digest,* tit. ASSUMPSIT V.

21. A bond and warrant of attorney to confess a judgment given by a bankrupt after his bankruptcy, in order to obtain his liberty, is not barred by his

certificate, although the original debt were contracted before.

Birch v. *Sharland*. 1 T. R. 715

22. The old debt was extinguished by such bond given for such purpose. 1 T. R. 715

23. A cognovit is not discharged by bankruptcy and certificate, it being only an acknowledgment of the amount of the damages.

Wyborne v. Ross. 2 W. P. T. 68

24. If the payee of a promissory note pay the amount of it to an indorsee after the bankruptcy of the maker, he may recover against the maker, notwithstanding his bankruptcy and certificate. *Howis* v. *Wiggins*. 4 T. R. 714

25. *A.* draws a bill of exchange on *B.* in favour of *C.*, who indorses it to *D.*, who discounts it. *Before the bill is due, A. becomes a bankrupt and obtains his certificate;* when the bill is due, payment is refused: upon which *C.* refunds the money to *D.* which was advanced in discount, and takes back the bill. To an action brought by *C.* against *A.* on the bill, *A. cannot plead his bankruptcy.*

Brooks v. *Rogers*. 1 H. B. 640

26. *A.* draws a bill of exchange on *B.*, payable to the order of *A.*, which *B.* accepts, and *B.* draws a bill on *A.* payable to the order of *B.*, which *A.* accepts, for their mutual accommodation; both bills are payable at the same time, have the same dates, and contain the same sums: one is a good consideration for the other, and neither is an indemnity; so that if either party becomes a bankrupt, the bill accepted by him may be proved under his commission, and consequently to an action brought on it, his bankruptcy may be pleaded.

Rolfe v. *Caslon*. 2 H. B. 570

27. *A.* and *B.* exchanged acceptances, and each party having negotiated the respective bills, became bankrupt; and *B.*'s assignees were afterwards obliged to pay a dividend as drawer on the bills accepted by *A.*, as well as to pay *B.*'s own acceptances. *Qu.* If *A.*'s certificate is a bar to an action brought against him by *B.*'s assignees for money paid, &c.?

Cowley v. *Dunlop*. 7 T. R. 565

28. If the acceptor of a bill of exchange not due, become bankrupt, and the indorser be afterwards obliged to take up the bill on account of non-payment by the acceptor, and the acceptor afterwards obtain his certificate, he will be discharged from the debt, and the court will enter an *exoneretur* on the bail-piece in an action against him at the suit of the indorser.

Joseph v. *Orme*. 2 N. R. 180

29. The drawer of a bill of exchange, which had been accepted, and was not refused payment by the acceptor till after the bankruptcy of the drawer, is discharged by his certificate, inasmuch as such debt is made proveable under his commission by the stat. 7 *G.* 1. *c.* 31.

Starey v. *Barnes*. 7 E. R. 435

30. The defendants gave to the plaintiff their own bills accepted by third persons, in exchange for his acceptances of other bills drawn by them upon him, the different sets of which tallied, except as to some trifling differences on which no stress was laid at the time: held, that the transaction being that of an *absolute exchange* of securities, each party was confined to his remedy on those securities, and the law would not raise an implied promise in the defendants, who had become bankrupts, to repay to the plaintiff a part of the amount of his acceptances which was paid by him after the bankruptcy.

Buckler v. *Buttivant*. 3 E. R. 72

31. Where the plaintiff lent his indorsement upon a bill at the desire of the drawer, but without any privity with the defendant (the acceptor), who had himself no consideration at the time for such acceptance; and the day before the bill became due the defendant became bankrupt, and it was immediately after taken up by the plaintiff (the indorser) out of the hands of the indorsee: held, that the bill being proveable as a debt under the defendant's commission, and there being no privity of contract between these parties collateral to the bill, like the case of principal and surety, nor any promise of indemnity, the plaintiff could not recover the amount of the bill paid after the bankruptcy against the defendant who had obtained his certificate.

Houle v. *Baxter*. 3 E. R. 177

32. *A.* sold a ship to *B.* with a covenant that he had a good title, though in fact he had none. Afterwards *A.* became a bankrupt, and *B.* sustained damage by paying the value of a ship to the true owner: held, in an action on the covenant by *B.* against *A.*, stating

the special damage, that *A.*'s certificate was no bar.

Hammond v. *Toulmin.* 7 T. R. 612

33. Bankruptcy is no bar to an action of trover, though the conversion happened before the bankruptcy, and though the cause of action were of such a nature that the plaintiff *might have waved the tort*, and proved his demand as a debt under the commission.

Parker v. *Norton.* 6 T. R. 695

34. A discharge under a commission of bankrupt in a foreign country, is no bar to an action for a debt, arising here, brought against the bankrupt by a subject of this country.

Smith v. *Buchanan.* 1 E. R. 6

35. But where the defendant gave to the plaintiff in a foreign country, where both were resident, a bill of exchange drawn by the defendant upon a person *in England*, which bill was afterwards protested here for non-acceptance, and the defendant afterwards, while still resident abroad, became bankrupt there, and obtained a certificate of discharge by the law of that state: it was held, that such certificate was a bar to an action here upon an implied assumpsit to pay the amount of the bill in consequence of such non-acceptance in *England*. *Potter* v. *Brown.* 5 E. R. 124

36. What is a discharge of a debt in the country where it was contracted, is a discharge of it every where. 5 E. R. 130 (And see tit. FOREIGN LAWS.)

V. *Debts; what may be proved under the Commission.*

1. Where *S. L.* was arrested for the amount of goods, and *E. L.*, in order to procure his discharge, became bound, as surety with him, in a bond to the plaintiffs, payable by instalments, and before the first default *E. L.* became a bankrupt, the plaintiff is bound to prove his debt under the commission by virtue of 7 *G.* 1. *c.* 31. for the credit was given to *both*.

Brookes & al. v. *Lloyd.* 1 T. R. 17 (See *ante*, IV. *and post*, *Art.* 17.)

2. School-money for the education, &c. of the defendant's son, payable half-yearly, is not a *debt due* till the end of the half-year, so as to be proveable under a commission of bankrupt against the parent, who became bankrupt a few days before the end of the half-year; though he had, just before his bankruptcy, and before the holidays began, taken his son home *for the holidays*.

Parslow v. *Dearlove.* 4 E. R. 438

3. The stat. 7 *G.* 1. *c.* 31. § 1., which enables creditors to prove debts payable at a future day, under the commission, is confined to *written* securities. 4 E. R. 438

4. Where goods were sold and delivered upon an *agreement* to be paid for by a present bill payable at a future date (but which bill never was given or demanded, and seven days after the delivery of the goods the debtor committed an act of bankruptcy), it was held that this did not create a present debt sufficient to enable such debtor to petition for a commission of bankruptcy against the debtor; the statutes 7 *G.* 1. *c.* 31. § 1. and 5 *G.* 2. *c.* 30. § 22. being confined to debts due on bills, bonds, promissory notes, and other personal *written securities* of the like sort, payable at a future day; which alone by the latter statute are made available to found a good petitioning creditors debt.

Hoskins v. *Duperoy.* 9 E. R. 498

5. A specific sum of money received by an overseer of the poor, is not such a debt as can be proved under a commission of bankrupt against him before his accounts are delivered in.

R. v. *Egginton.* 1 T. R. 369

6. Where after a recovery in ejectment, and before an action of trespass for mense profits, the defendant became a bankrupt, and the jury did not include the costs of the ejectment in their verdict in executing a writ of inquiry in the action for mense profits, the court refused to set aside the inquisition, because the plaintiff might have proved the costs as a debt under the defendant's commission of bankrupt.

Gulliver v. *Drinkwater* 2 T. R. 261

7. If a demand be payable *at all events*, though at a future day, it may be proved under a commission of bankrupt against the debtor, or set off against an action brought by his assignees; but if it rest in contingency whether it will become payable or not it cannot be so proved or set off, unless it be secured by a penalty which is forfeited at law.

Hancock v. *Entwistle.* 3 T. R. 435 (See tit. SETT-OFF.)

8. If *A.* give a warrant of attorney to *B.* to confess a judgment immediately,

with a defeasance that judgment shall not be entered up until a subsequent day on a contingency, and *A.* become bankrupt before that day, though *B.* afterwards enter up judgment on the happening of the contingency, he cannot prove this debt under *B.*'s commission.

Staines v. *Planck.* 8 T. R. 386

9. When a creditor has a demand on his debtor, which is capable of being ascertained without the intervention of a jury, and which does not found merely in damages, and the debtor becomes a bankrupt, it may be proved as a debt under the commission.

3 T. R. 539

10. But if *A.* lend stock to *B.*, to be replaced as stock, without naming any particular day, and *B.* become a bankrupt before any request by *A.* to replace the stock, *A. cannot* come in under *B.*'s commission *A.*'s demand in this case resting merely in damages.

Utterson v. *Vernon.* 4. T. R. 570

[*Altering the opinion before given in the same case.* 3. T. R. 539.]

11. A right of action on a breach of covenant, not secured by a penalty, and where the damages to be recovered are uncertain, is not barred by the certificate of the defendant who became a bankrupt after the covenant was broken.

Banister v. *Scott.* 6 T. R. 489

12. Where a debt arises before a bankruptcy, but a verdict is obtained and costs taxed after the bankruptcy, the costs are considered as part of the original debt and may be proved as such under the bankruptcy. The court of C. P. therefore discharged the bankrupt out of custody who had been taken in execution for such costs.

Lewis v. *Piercy.* 1 H. B. 29

So where a defendant became bankrupt between the verdict and judgment. *Longford* v. *Ellis*, B. R. *E.* 25 *G.* 3. 1 H. B. 29, *n.*

13. The Court of K. B. held that if a plaintiff become a bankrupt after he is nonsuited, and before the taxation of costs, the costs of the nonsuit are a debt proveable under the commission.

Hurst v. *Mead.* 5 T. R. 365

14. After some hesitation the Court of C. P. on the authority of the preceding cases, determined that if a plaintiff become bankrupt after a nonsuit at *nisi prius*, and before the judgment of nonsuit, the costs of the nonsuit are a debt proveable under the commission.

Watts v. *Hart.* 1 B. & P. 134

15. But the court of K. B. held that the costs of a suit in Chancery, directed to be paid by an award made before the bankruptcy of the defendant, but which costs were not taxed till after he became bankrupt, could not be proved under the commission; but that the bankrupt remained liable to be attached for the amount under the award made a rule of court.

R. v. *Davies.* 9 E. R. 318

16. If *A.* recover a judgment against *B.* before the bankruptcy of *B.*, and revive it by *scire facias* after the bankruptcy, the costs of the *scire facias* relate back to the judgment, and may be proved under the commission.

Philips v. *Brown.* 6 T. R. 282

17. So if a writ of error be brought after the bankruptcy, to reverse a judgment against the bankrupt before, and the judgment be affirmed, the costs of the writ of error refer to the judgment. 6 T. R. 282

18. And in either case the bankrupt's certificate discharges him as to the costs as well as with regard to the judgment. 6 T. R. 282

19. If a plaintiff after judgment obtained prove his debt, under a commission of bankrupt sued out against the defendant, and also proceed against the bail, the bail are thereby entitled to their discharge under stat. 49 *G.* 3. *c.* 121 § 14: and the Court of C. P. discharged them on motion.

Linging v. *Comyn.* 2 W. P. T. 246

20. If an action be commenced against a bankrupt, after a commission, for business done before the bankruptcy, and the bankrupt afterwards obtain his certificate, the defendant is discharged from the costs as well as the debt, and the court will enter an *exoneretur* on the bail-piece.

Willett v. *Pringle.* 2 N. R. 196

21. *X.* became bound as a surety with *Y.* to *A.* on the 10th of *Aug.* 1778, in a bond conditioned for payment in six months; on the 1st *March*, 1780, he became bound with *Y.* to *B.* in a bond conditioned for payment in six months, on the 4th of *March* 1780, *Y.* became bound to *X.* in a bond conditioned for payment of two former bonds, and also to indemnify *X.* against those two bonds: the money secured by the

second bond not being paid when it became due, it was holden that the last bond was thereby forfeited, though *X.* was not called on to pay the money in the second bond until afterwards, and that *X.* might prove it as a debt under the commission of bankrupt that issued against *Y.* after the forfeiture and before payment.

Hodgson v. *Bell.* 7 T. R. 97

22. Money paid by one partner to another *before* the bankruptcy of the latter, for the purpose of being paid over as his liquidated share of a debt to their joint creditor, if it be not so applied is proveable as a debt under the commission, and consequently barred by the certificate, although the solvent partner were not called upon to pay the debt to the joint creditor till after the bankruptcy. But the solvent partner may recover from the bankrupt, notwithstanding the certificate, his (the bankrupt's) share of such debt so paid *after* the bankruptcy to the joint creditor.

Wright v. *Hunter.* 1 E. R. 20

23. *A.* engages as a partner in a particular transaction with *B. C.* and *D.* who were before partners, and who continued partners among themselves as to their share in the transaction: *B. C.* and *D.* become bankrupts, after which *A.* pays a debt due from himself and them to a joint creditor; held that these three partners constituted but one debtor to *A.* and he might recover from *B.*, not *B.*'s proportion alone, but the whole proportion of *B. C.* and *D.* towards the joint debt; *B.* not having pleaded in abatement.

Wright v. *Hunter.* 1 E. R. 20

VI. *Notice of Bankruptcy, whom it shall affect.*

1. A banker is not justified in paying the drafts of a person who has placed money in his hands after he has notice of an act of bankruptcy committed by him. *Vernon* v. *Hankey.* 2 T. R. 11

2. When the assignees of a bankrupt have recovered a sum of money from the bankrupt's banker, received by him, and paid over to a creditor of the bankrupt with knowledge of the bankruptcy, they cannot recover the same sum from the creditor, though he received it after notice of the bankruptcy.

Vernon & al. v. *Hanson.* 2 T. R. 287

3. But the assignees had their option at first to bring the action against the banker or against the person to whom the banker paid the money under the above circumstances. 2 T. R. 287

4. A factor gave his acceptance to his principal for the amount of goods sold on account, after a secret act of bankruptcy of the principal, but without notice to the factor; and after notice of the bankruptcy the factor paid his acceptance to the holder of the bill; held that the payment was protected by stat. 1 *J.* 1. *c.* 15. § 14.

Wilkins & al. v. *Casey.* 7 T. R. 711

VII. *Petitioning Creditor.*

1. Whether proof of a debt of 161*l.* to one of the petitioning creditors, there being more than three, will support the commission of bankrupt. *Qu.* 1 T. R. 475

2. *A.*, a creditor of *B.*, to the amount of 115*l.* took his bill for 20*l.* on *C.*, who had not then, nor afterwards, any effects of *B.* in his hands: the bill, when due, was dishonoured, and no notice thereof was given by *A.* to *B.*: still *A.*'s demand was not discharged; but he may sue out a commission of bankrupt against *B.* and his debt will support it.

Bickerdike & al. v. *Bollman.* 1 T. R. 405

3. A creditor of a bankrupt to the amount of 112*l.* previous to the bankruptcy receiving 50*l.* after notice of an act of bankruptcy, is not thereby precluded from suing out a commission of bankrupt; for by that act he waves his claim to the payment; and he may still retain the money in his hands for the credit of the bankrupt's estate. *Mann & al.* v. *Shepherd.* 6 T. R. 79

4. A judgment-creditor who has taken his debtor in execution, cannot afterwards sue out a commission of bankruptcy against him upon the same debt.

Cohen v. *Cunningham.* 8 T. R. 123

5. Where the petitioning creditor's debt did not amount to 100*l.* at the time of the act of bankruptcy, but was increased to more than 100*l.* by a promissory note of the bankrupt due at that time being indorsed to the petitioning creditor before he petitioned for the commission, this debt was deemed sufficient to support the commission. *Glaister* v. *Hewer.* 7 T. R. 498

6. A commission of bankrupt sued out upon the affidavits of four petitioning

12. Until an act of bankruptcy, the *jus disponendi* over goods, remains by law with the trader, unless he exercise it by way of voluntary and fraudulent preference of a particular creditor in contemplation of bankruptcy. 5 E. R. 186

13. Therefore where traders, having ordered goods from the defendants which were forwarded, but were afterwards taken possession of by the defendants upon a claim of right to stop them in *transitu*, called a meeting of their creditors, and took legal advice, by the result of which meeting and advice, they were encouraged to give up the goods which they accordingly communicated to the defendants: held that these circumstances were evidence for the jury to find that the goods were given up by the traders; and given up by them *bonâ fide*, and not from any motive of voluntary and undue preference, though they were then in a situation of impending bankruptcy. *Dixon & al. (Assignees)* v. *Baldwen.* 5 E. R. 175

14. Though a bankrupt cannot give a lien on any particular goods, yet he may take a demise, and agree that the rent shall be payable on a particular day, in which case the law gives the landlord a power of distraining on that day. *Buckley* v. *Taylor.* 2 T. R. 603

15. *A.* become bound as a surety for *B.*, who in order to indemnify him agreed that he should retain out of any money that should be due from him to *B.*, in respect of any dealings between them in trade, so much as he should pay on the bond; *B.* afterwards sold goods to *A.* of a less value than the money secured by the bond, and then became a bankrupt, and *A.* was obliged to satisfy the bond; held that the assignees of *B.* could not recover in an action for goods sold and delivered, there being nothing due to the bankrupt's estate on the original contract.

Dobson & al. v. *Lockhart.* 5 T. R. 133

16. It is no objection to a commission of bankruptcy that it was sued out with intent to defeat a previous execution, if no collusion appear on the part of the bankrupt.

Menham v. *Edmonson.* 1 B. & P. 369

13. *A.* gave *B.* a bond to secure an annuity, and before any payment became due, *A* lent *B.* a sum of money; on which it was agreed that *B.* should retain the payments of the annuity as they became due till that sum was discharged; then *B.* became a bankrupt, and the agreement to retain was held a good plea, to an action on the bond by *B.*'s assignees, for the payments accruing after the bankruptcy; such agreement and retainer being equivalent to a plea of *solvit ad diem.* *Sturdy* v. *Arnaud.* 3 T. R. 599

IX. *Trader; who shall be considered as.*

1. The Court of K. B. held that a person who rents a brick ground and makes bricks thereon for public sale, and bought sand and fuel, being necessary ingredients for converting the earth and clay into bricks was subject to the bankrupt laws.

Wells v. *Parker.* 1 T. R. 34

[The special verdict in this case being insufficient, the judgment of the Court of K. B. was on appeal to the house of Lords reserved, and a *venire de novo* awarded; 1 T. R. 783. but which was not proceeded on; and the business ended in a new commission of bankruptcy, to which *Parker* submitted.]

2. In a subsequent case the court of K. B. held that a devisee for life of an estate, part of which was a brick ground, making bricks there for sale generally, with a view to profit, is not a trader within the bankrupt laws, though he purchased the coals and some of the wood used in burning the bricks, and had occupied the same ground as a brickmaker for general sale before the estate came to him by devise: for this is but a more beneficial mode of enjoying his own his own estate, by carrying the soil to market in an ameliorated state; and it is not a buying of any commodity, to sell it again: nor does it fall within the principle of the bankrupt laws which were levelled against those who getting other men's goods into their hands obtain credit upon and consume the same.

Sutton v. *Weeley.* T. 46 G. 3. 7 E. R. 442

3. Renting a brick-ground as a distinct occupation, is a mode of purchasing the clay. 1 T. R. 40

4. If a man exercise a manufacture from the produce of his own land, as a necessary or usual mode of enjoying that produce, he shall not be considered as a trader, though he buy necessary ingredients to fit it for the market; but where the produce of the land is merely the raw material of a manu-

facture, and the manufacture not the necessary mode of enjoying the land, there he is a trader. 1 T. R. 38, 9

5. As in the case of a farmer, who makes cheese on his own land, and buys runnet and salt; he is not a trader. 1 T. R. 38, 9

6. So where a man makes his own apples into cyder. 1 T. R. 38, 9

7. Proprietors of alum-works are no traders. 1 T. R. 38, 9

8. Neither are the workers of coal-mines. 1 T. R. 38, 9

9. An innkeeper, who sells liquor out of the house to all customers applying for it, is subject to the bankrupt laws, however inconsiderable the extent of such dealing, and the profits arising from it may be.

Patman v. *Vaughan*, 1 T. R. 572

10. So is a farmer, who buys and sells horses with a view to make a profit by them, though the instances be few. *Bartholomew* v. *Sherwood*, *M.* 27 *G* 3, 1 T. R. 573, *n.*

11. A *farmer and grazier*, exercising also the business of a *drover*, by buying cattle from time to time beyond the occasion of his farms and selling them again, is exempted from the operation of the bankrupt laws by stat. 5 *G.* 2. *c.* 30. § 40. And the purchase of hay for the support of his cattle, and the sale of part of it again, because it was more than was required for their consumption, will not make him a trader, for the hay had been purchased for the sake of the cattle, and not to sell again, and the sale of it was quite incidental, because there was more than was requisite for the cattle.

Bolton v. *Sowerby*. 11 E. R. 274

12. The like point was decided in the Court of C. P. with the additional circumstance that the defendant had resold on the same day, and in the same room, a quantity of oats, and which was to be delivered by the original seller to the new purchaser.

Stewart v. *Ball*. 2 N. R. 78

13. A person resided in *India*, and traded there, and in the course of that trading drew bills upon *England* for the value of other bills sent thither, upon which he got a profit by the exchange, and in the course of that dealing contracted debts in *England*: held that he was a trader within the meaning of the bankrupt laws, and that a commission of bankrupt might issue upon an act of bankruptcy committed by him in *England* after he had quitted *India*

Inglis v. *Grant*. 5 T. R. 530

14. To bring a case within the stat. 21 *Jac.* 1. *c.* 19. as to goods and chattels in possession of the bankrupt; he must have been a trader when he was in possession of the property.

Gordon v. *E. I. Company*. 7 T. R. 228

15. The purchase of one lot of timber, with intent to sell again, will make a man a trader.

Holroyd & al. v. *Gwynne*. 2 W. P. T. 176

X. *Trust Property; the Effect of Bankruptcy on; and what shall be considered as such.*

1. A debt due to a bankrupt, as trustee for another, does not pass under the assignment of his effects by his commissioners. 1 T. R. 619

2. S. P. *Carpenter* v. *Marnell*. 3 B. & P. 40

3. Therefore a bankrupt having previously assigned a chose in action on a valuable consideration, may sue the debtor in his own name for the benefit of the assignee. *Winch* v. *Keely*. 1 T. R. 619

4. And the action *must* be in the name of the bankrupt; it will not lie in the names of the assignees under the commission. 3 B. & P. 40

5. Where a bankrupt is in the possession of the goods of another *bonâ fide* with the owner's consent at the time of the bankruptcy, for a *specific purpose*, beyond which he has not the right of disposition or alteration, that is not such a possession as entitles the assignees to recover the value of them under stat. 21 *Jac.* 1. *c.* 19. § 11.

Collins v. *Forbes*. 3 T. R. 316 (But see the opinion of *Lawrence J.* 7 T. R. 237)

6. *A.* and *B.* came to this agreement, that *B.* should purchase of *A.* all goods of a certain kind (light gold coin) which he could send, at a stated price, and that *A.* should from time to time draw upon *B.* for the money due upon such sale; and that *B.* should also from time to time accept other bills drawn by *A.* for his own convenience, for which *A.* was to remit value: after they had acted under this contract for some time, *B.* became a bankrupt, being under acceptances to a large amount; and *A.* not knowing of the bankruptcy, sent a quantity of light gold and bills to enable *B.* to discharge the acceptances, which parcel

was taken by *B.*'s assignees: it was held that *A.* who had since paid *B.*'s acceptances, might recover back the gold and bills sent after the bankruptcy on the ground that they were sent *for the particular purpose of paying these acceptances*, and that as that purpose was not answered, the property in the gold, &c. remained in *A.*, for whom *B.* should be considered as the factor or *banker*. *Tooke* v. *Hollingsworth & al. (Assignees)*. 5 T. R. 215
(Affirmed in *Cam. Scac.* 2 H. B. 501; and see *ante*, DIV. II. tit. FELONY.)

5. *A.* having contracted with a canal company to build locks and bridges on the canal as their engineer, purchased timber and other materials for the purpose, which were laid on the company's premises on the banks of the canal; and on the company's advancing money to him, they took a bill of sale of these goods, and a symbolical delivery of them by a halfpenny; afterwards the company took out execution upon a judgment confessed by *A.* and the sheriff seized these goods, and *A.* became a bankrupt: held that *A.* had not such a possession of the goods as would enable his assignees to take them within stat. 21 *Jac.* 1. *c.* 19. § 11; for the best delivery was made that the nature of the goods would admit of, they being before on the company's premises.

Manton v. *Moore*. 7 T. R. 67

8. Also ruled that the above bill of sale was not an act of bankruptcy in *A.*
7 T. R. 67

9. If the furniture of a coffee-house be taken in execution by a creditor, and without ever being moved, be let by him to the keeper of the coffee-house, who becomes bankrupt while in possession of it, the assignees are entitled to it, and may seize it under the said stat. 21 *Jac. c.* 19.

Lingham v. *Biggs et al.* 1 B. & P. 82

10. If the printer and publisher of a newspaper assign his interest therein to a creditor as a security, but continue to print and publish as before, and no affidavit of the change of interest be delivered to the commissioners of stamps, and the printer become bankrupt, the right to the paper will pass to his assignees, under the assignment of the commissioners.

Longman v. *Tripp*. 2 N. R. 67

11. If standing timber be sold to a trader, with a proviso that in case of bankruptcy the vender may retake it, such a condition is void under the statute 21 *Jac.* 1. if the bankrupt has the possession of the wood.

Holroyd & al. v. *Gwynne*. 2 W. P. T. 176

12. *A.*, *B.*, and *C.*, distillers, occupied as partners certain premises leased to *A.* and another, and used in common in the trade the stills, vats, and utensils necessary for carrying it on, the property of which stills, &c. afterwards appeared to be in *A.* On the dissolution of the partnership, which was a losing concern, it was agreed that *C.* and one *J.* should carry on the business on the premises; and by deed between the two last and *A.* it was covenanted, that *A.* should withdraw from the business, and permit *C.* and *J.* to use, and occupy the distil-house and premises, paying the reserved rent, &c, and the several stills, vats, and utensils of trade specified in a schedule, in consideration of an annuity to be paid by *C.* and *J.* to *A.* and his wife and the survivor; with liberty for *C.* and *J.*, on the decease of *A.* and his wife, to purchase the distill-house and premises for the remainder of *A.*'s term, and the stills, vats, &c and *C.* and *J.* covenanted to keep the stills, vats, and utensils in repair, and deliver them up at the time, if not purchased: with a proviso for re entry if the annuity were two months in arrear. Upon this *C.* and *J.* took possession of the premises, with the stills, vats, and utensils, and carried on the business as before; and made payments of the annuity, which afterwards fell in arrear more than two months; *A.*'s widow and executrix who survived him did not enter, but brought an action for the arrears, which was stopped by the bankruptcy of *C.* and *J.* who continued in possession of the stills, vats, and utensils on the premises. The Court of K. B. held that the stills which were fixed to the freehold did not pass to the assignees under the words *goods and chattels*; but that the vats, &c. which were not so fixed did pass to the assignees, as being left by the true owner in the possession order and disposition (as it appeared to the world) of the bankrupts as reputed owners.

Horn v. *Baker*. 9 E. R. 215

13. Goods, the property of a widow and children, were, upon her second marriage, assigned to trustees, in trust, to suffer the husband to enjoy them, on

condition he should pay to the trustees, for the use of the children, 800*l.* by yearly instalments of 100*l.* from *July* 1789: he continued in possession of them until 1797, having paid only 250*l.*: the day before his bankruptcy the trustees repossessed themselves of the goods: the Court of K. B. held this was fraudulent as against creditors, and that the assignee of the bankrupt was entitled to the goods under the said stat. 21 *Jac.*

Darby & al. v. *Smith.* 8 T. R. 82

15. If *A.* and *B.* have a general running account consisting of bills drawn by *B.* on *C.* in favour of *A.* and of bills and other securities deposited by *A.* with *B.*, and upon the failure of *B.* and *C. A.* be obliged to take up the bills received by him from *B.*, whereby the balance of the accounts is in favour of *A.* still he cannot maintain trover for the bills deposited by him with *A.*, unless they were specifically appropriated to answer *A.*'s drafts on *C.* in favour of *A.*, and deposited for that purpose expressly.

Bent v. *Puller.* 5 T. R. 494

16. A customer paying bills, not due, into his bankers in the country, who credited their customers for the amount of such bills, if approved, as cash (charging interest), is entitled to recover back such bills in specie from the bankers becoming bankrupt; the balance of his cash account, independent of such bills, being in his favour at the time of the bankruptcy: and if payment be afterwards received upon such bills by the assignees, they are liable to refund it to the customer in an action for money had and received.

Giles v. *Perkins.* 9 E. R. 12

17. *A.* desires leave to place certain long bills in *B*'s hands, and to be allowed permission to draw, without renewals, bills of shorter dates, and desires *B.* to calculate the sum to be drawn for, allowing commission; and the long bills indorsed by *A.* are enclosed to *B.* in the same letter. *B.* answers that, agreeable to *A.*'s wishes, he had discounted the bills, and then specifies the amount to be drawn for. This transaction is not an exchange or sale of bills upon discount, but a deposit of the long bills, on condition of being allowed to draw shorter bills; therefore *B.* having become bankrupt, whereby *A.*'s bills were dishonoured, and the long bills having remained in *B.*'s hands at the time of his bankruptcy; held that *A.* might recover the amount of them from the assignees, who had afterwards received payment of them.

Parke v. *Eliason.* 1 E. R. 544

13. *A. B. C.* and *D.* were partners in a banking house at *Liverpool*, and *C.* and *D.* also carried on a separate mercantile account in *London*; *J. S.* having accepted bills payable at the house of *C.* and *D.* employed *A. B. C.* and *D.* to get them paid accordingly, and agreed to deposit with them good bills *indorsed by him*, for the purpose of enabling them so to do; *A. B. C.* and *D.* debited *J. S.* in account for his acceptances, and credited him for all the bills he deposited; two of the bills so deposited by *J. S.* were remitted by *A. B. C.* and *D.* to *C.* and *D.* upon the general account between the two houses; and before any of the acceptances of *J. S.* became due, both houses failed, and *J. S.* was obliged to pay all his own acceptances: in an action of trover by *J. S.* against the assignees of *C.* and *D.* the house in *London*, the Court of C. P. after two arguments, held that the assignees were entitled to retain against *J. S.* the two bills remitted to them by *A. B. C.* and *D.*: held also, that it made no difference that one of the bills remitted did not arrive in *London* until after the bankruptcy of *C.* and *D.*, though sent by *A. B. C.* and *D.* before the event.

Bolton v *Puller & al.* 1 B. & P. 539

14. If *A.* deposit bills indorsed in blank with *B.* his banker to be received when due, and carried to his account, and the latter raise money upon them by *pledging* them with *C.* another banker, and afterwards become bankrupt, *A.* cannot maintain trover against *C.* for the bills.

Collins v. *Martin & al.* 1 B. & P. 649

BARON AND FEMME.

I. *Actions by, or against.*

1. If a bond be given to husband and wife, administratrix, the husband alone may declare on it as a bond made to himself.

Ankerstein v. *Clarke.* 4 T. R. 616

2. The wife can only join with the husband in bringing an action where she is *the meritorious cause of action*; as where a legacy is left to her.

Rose & Ux. v. *Bowler & al.* 1 H. B. 108

3. The husband cannot be sued alone for

the debt of his wife contracted before marriage.

Mitchinson v. *Hewson.* 7 T. R. 348

4. A recovery in ejectment against a wife, living separate from her husband with a segarate maintenance, cannot be given in evidence in an action against the husband and wife for mesne profits; for the husband was no party to the ejectment.

Denn v. *White.* 7 T. R. 112

5. After interlocutory judgment against a femme upon a contract, she marries: yet the plaintiff may proceed to judgment and execution against her, without joining the husband by *scire facias;* and a *capias* and *satisfaciendum* against her following the judgment is, at all events, regular, though the plaintiff had notice of the marriage before.

Cooper v. *Rachael Hunchin.* 4 E. R. 521

6. Where a femme covert had been many years separated from her husband, and during that time, had received for her separate use, the rents of her own property which accrued to her by devise after the separation: evidence being given by a witness that he had received the rent of the premises for the femme, and paid it over to her, but never had paid it to the husband, the Court of K. B. held that the femme should be presumed to have received the rent, and acknowledged the tenancy by her husband's authority.

Doe d. Leicester & al. v. *Biggs.* 1 W. P. T. 367

7. A joint-demise by husband seized in right of his wife, and his wife, is disproved by evidence of a receipt for rent given by the husband only.

Parry v. *Hindle.* 2 W. P. T. 180

II. *Femme Covert: when considered as a Femme Sole: and what she may do: and of Articles of Separation.*

1. A femme covert, living apart from her husband, and having a separate maintenance, may contract and be sued as a femme sole.

Corbett v, *Poelnitz & Ux.* 1 T. R. 5

2. And she continues liable though she aliens the whole again. 1 T. R. 10

3. In such case the husband is not liable even for necessaries. 1 T. R. 10

4. Where credit has been given to the wife of a man in exile, she alone is liable. 1 T. R. 8

5. So where the husband has abjured the realm; or is transported. 1 T. R. 8, 9

6. Where a married woman has a separate estate, and acts and receives credit as a femme sole, she shall be liable as such. 1 T. R. 9

7. A femme covert cannot be sued as a femme sole, unless she be *separated* from her husband, *and* have a *fixed certain* allowance secured to her as a maintenance. *Elluh* v. *Leigh.* 5 T. R. 679

8. To a plea of coverture the plaintiff replied that the defendant was separated from her husband, that alimony was allowed her by the Ecclesiastical Court pending a suit there, which was a sufficient maintenance, and that she obtained credit, and made the promises on her own account as a femme sole, and not on the credit of her husband; on demurrer, this replication was held to be bad. *Elluh* v. *Leigh.* 5 T. R. 679

9. The court of K. B. held that a femme covert living in adultery and separate from her husband, cannot be sued as a *femme sole* if she have no separate maintenance. *Gilchrist* v. *Brown.* 4 T. R. 766. But see *Cox* v. *Kitchin.* 1 B. & P. 338

10. The husband (a foreigner) residing abroad, and the wife trading and obtaining credit in this country as a femme sole; the Court of C. P. held that she was liable for her own debts.

De Gaillon v. *L'Aigle.* 1 B. & P. 357

12. After two arguments before all the judges, the Court of K. B. declared it to be their opinion that a femme covert, living apart from her husband, having a separate maintenance secured to her by deed, cannot contract and be sued as a femme sole; in fact, that by no agreement between a man and his wife can she be made legally responsible for the contracts she may enter into, or be liable to the actions of those who may have trusted to her engagements as if she were sole and unmarried. *Marshal* v. *Rutton.* 8 T. R. 545

13. And the Court of K. B. discharged a married woman on filing common bail, who was sued for goods sold and delivered to her by the plaintiff; knowing at the time that she was a married woman, though living apart from her husband with a separate maintenance.

Wardell v. *Gooch.* 7 E. R. 582

14. The court of C. P. however, refused to discharge a defendant on the ground of coverture, she being a foreigner, and her husband abroad, though she was not separated from him by deed, had no separate maintenance, nor had represented herself as a single woman.

Burfield v. *Duchesse de Pienne.* 2 N. R. 380

15. Upon the authority of the foregoing cases of *Corbett* v. *Poelnitz* and *Marshall* v. *Rutton*, the Court of C. P. held that if husband and wife separate by deed, and the former covenant with *A.* the wife's sister, to pay to his wife, or such person as she should appoint, a certain weekly allowance, during their separation, and the wife afterwards live with *A.* and is by her supplied with necessaries, and the husband fails to pay the stipulated allowance to his wife, *A.* may maintain an indebitatus assumpsit against the husband for such necessaries.

Nurse v. *Craig.* 2 N. R. 148

16. To a plea of coverture the plaintiff replied that the defendant's husband lived in parts beyond the seas, viz. in *Ireland*, and that the defendant lived in this kingdom separate from her husband, and as a single woman promised: held bad on general demurrer.

Farrar v. *Countess Dowager of Grantard.* 1 N. R. 80

17. An Englishman employed in the service of the British government residing in a foreign country, and having lands there, upon the cessation of his employment, in consequence of war between the two countries, sent his wife and family to this country, but continued to reside abroad himself: held that the wife, not having represented herself as a femme sole, was not liable to be sued as such.

Marsh v. *Hutchinson.* 2 B. & P. 226

18. A femme covert cannot sue without her husband, as a sole trader by the custom of *London*, in the superior courts at *Westminster*.

Caudell v. *Shaw.* 4 T. R. 361

19. A femme covert cannot in general cases be sued alone on promises made by her, except by the custom of *London*.

Clayton v. *Adams.* 6 T. R. 605

20. Neither can the executor of a femme covert, though it appear on the record that the executor possessed himself of her effects sufficient to satisfy the plaintiff's demand. 6 T. R. 605

21. The probate of the will in such case is absolutely void. 6 T. R. 605

22. Prohibition lies to the Spiritual Court if a suit be instituted to obtain a *general* probate of the will of a woman made during her coverture, though *with* her husband's consent, and though she *survived* him; for he could not by any assent of his enable her to dispose by any will made during the coverture, of property which she might acquire after his death, but only of property over which he himself had a disposing power.

Scammell v. *Wilkinson.* 5 E. R. 552

23. But a femme covert may make a will disposing of property which she only has in *autre droit*, as executrix, without her husband's consent. *ib.*

24. It has now been solemnly determined in the Exchequer Chamber, that a *femme covert*, sole trader in the city of *London*, is not liable to be sued as such in the courts at *Westminster:* and even in the city courts the husband must be joined for conformity. *Beard & Ux.* v. *Webb & al.* in error. 2 B. & P. 93

25. Where a femme covert, sole trader, gave a bond and warrant of attorney to enter up judgment, on which the plaintiff afterwards took out execution, the court set the judgment aside, as entered up without authority, on the motion of the assignees of the wife (who had become a bankrupt) with the consent of the husband, which was also entered in the rule. *Read* v. *Jewson. H.* 13 *G.* 3. *B. R.* 4 T. R. 362, *n.*

26. The court refused to set aside, upon summary application, a judgment entered upon a warrant of attorney given by a femme covert.

Maclean v. *Douglas.* 3 B. & P. 188

27. If a femme covert be taken in execution under a warrant of attorney given by her as a femme sole, the court will not discharge her on a summary application. *Wilkins* v. *Wetherill & Coutts.* 3 B. & P. 220

27. Though a note were given to a married woman, knowing her to be such, with intent that she should indorse it to the plaintiff in payment of a debt which she owed him (in the course of carrying on a trade in her own name by the consent of her husband), yet the property in the note vested in the husband by the delivery to the wife, and no interest passed by her indorsement to the plaintiff; neither can the plaintiff recover upon the money counts under such circumstances. *Barlow* v. *Bishop.* 1 E. R. 432

28. Perhaps if she had indorsed the note in the name of her husband it might have availed, as the jury might have presumed what was necessary in favour of an authority from her husband for that purpose. 1 E. R. 434

29. The husband having taken a bond, conditioned to pay an annuity to his

wife, she cannot, without his assent, discharge the obligor from future payments of the annuity for a certain period, in consideration of his discharging certain debts of the husband; but the husband may notwithstanding sue for the arrears of the annuity when due.

Brown v. *Benson*. 3 E. R. 331

30. A femme covert can do no act to estop herself. Per Lord *Kenyon*. 7 T. R. 539

32. Where a married woman lived apart from her husband, under articles of separation, by which he covenanted "that she shall enjoy to her own use "all such estates, both real and per- "sonal, as shall come to her during "the coverture, and that he will join "them to such uses as she shall ap- "point:" and *copyhold* lands having afterwards descended to her, the husband again covenanted in the same manner as before, and "that he would "*join in surrendering* such estates to "such uses as she shall appoint;" the Court of C. P. held that the wife might *surrender these copyhold lands without her husband joining*; and *without a special custom* for that purpose.

Compton v. *Collinson*. 1 H. B. 334

33. A covenant by a husband, to pay to trustees a certain annual sum by way of separate maintenance for his wife, in case of their future separation, with the consent of the trustees, their executors, &c. is valid in law.

Lord *Rodney* v. *Chambers*. 2 E.R. 283

(See ACTON on the CASE IV. 2.)

34 In an action on a bond, brought by the trustee of the defendant's wife to enforce payment of an annuity secured to her, the Court of C. P. refused to allow the defendant to withdraw the general issue, and plead that the wife had committed adultery, and was living in that state; and that she had committed adultery at the time the bond was executed, though the defendant was ignorant thereof; being of opinion that such pleas would not have been a good defence to the action.

Field v. *Serres*. N. R. 121

III. *Debts of the Wife; what the Husband is liable for.*

1. A second husband is liable for debts contracted by his wife while she was living in a state of separation from her first husband, and had a separate maintenance.

Corbett v. *Poelnitz & Ux*. 1 T. R. 5

2. Declaration on bond; plea that it was conditioned for performance of covenants which were to indemnify the obligee from alimony and debts incurred by his wife after their separation, and that defendant had performed the covenant; replication, that a judgment was recovered against the obligee by a creditor of his wife, and he paid debt and *costs*, of which defendant had notice. On demurrer, the defendant was held liable for the *costs* as well as the debt; for the covenant to indemnify is general, and it was not necessary for the plaintiff to give notice that an action was commenced; but if it had been necessary, the plaintiff would have recovered on these pleadings, for the defendant has admitted notice.

Duffield v. *Scott*. 3 T. R. 374

3. If a femme covert, without any authority from her husband, contract with a servant by *deed*, the servant having performed the service stipulated, may maintain *assumpsit* against the husband.

White v. *Cuyler*. 6 T. R. 176

4. A husband is not bound to receive nor is he liable to pay for necessaries found to his wife after she has committed adultery, though he has before committed adultery himself, and turned her out of doors without any imputation on her conduct.

Govier v. *Hancock*. 6 T. R. 603

5. Defendant's wife having committed adultery, he left her in his house with two children bearing his name, but without making any provision for her in consequence of the separation; she continued in a state of adultery; the Court of C. P. held that the husband should be liable for necessaries furnished to her, unless it appear that the plaintiff knew or ought to have known the circumstances under which she was living. *Norton* v. *Fazan*. 1 B. & P. 226

6. Where a husband goes abroad and leaves his wife, who dies in his absence, a third person who voluntarily pays the expenses of her funeral (suitable to the rank and fortune of the husband) though without the knowledge of the husband, may recover from him the money so laid out, especially if such third person be the father of the wife. *Quere* whether such third person can recover from the husband, money which he has expended after the death of the wife in *discharging debts* which she had contracted in her husband's absence?

Jenkins v. *Tucker*. 1 H. B. 90

IV. *Marriage Agreements between.*

1. If there be an agreement before marriage signed by the intended husband and wife, but not sealed, that a settlement shall be made of the wife's estate, reserving to her a power of disposing of it, and before the marriage the wife disposes of it to the husband, who survives her, and devises the estate; the title of his devisee is such a doubtful equity as cannot be set up in an ejectment against the wife's heir at law.

Doe d. Hodsden v. *Staple.* 2 T.R.684

2. A bond conditioned for the payment of money after the obligor's death, made to a woman in contemplation of the obligor's marrying her, and intended for her benefit if she should survive, is not released by their marriage. *Milbourn* v. *Ewart.* 5 T. R. 381

3. And if the marriage be pleaded in bar to an action of debt on the bond against the heir of the obligor, a replication stating the purposes for which the bond was made will be good; for they are consistent with the bond and condition. 5 T. R. 381

4. A woman may, *before* marriage, with the consent of her intended husband, convey all her stock in trade and furniture to trustees, to enable her to carry on her business separately; and if the husband do not intermeddle with them, and there be no fraud, such effects, though fluctuating, are not liable to his debts.

Jarman v. *Woollaton.* 3 T. R. 618

5. But whether the trade be carried on solely by the wife, or jointly with the husband, is a question of fact for the jury; and if they determine the latter, the stock in trade may be seized by the assignees of the husband, becoming a bankrupt. 3 T. R. 618

6. But even in such a case the *furniture* is not liable, though removed to the husband's house. 3 T. R. 618

7. It is no objection by creditors to such a settlement, that there is no inventory of the goods intended to be thus settled. 3 T. R. 618

8. The question in all such cases is, whether the possession is consistent with the deed. *Haselinton* v. *Gill.* B. R. T. 24 *G.* 3. 3 T. R. 620 *n.*

9. And where cows in a dairy were so settled, the wife was also held entitled to *the increase and produce arising therefrom.* *ib.*

10. One who had a life interest in a settled estate of his wife (both of them being aged) of at least 3000*l.* a year; whereof the ultimate reversion on failure of issue male (of which there was none) was in her, and having furniture and pictures, &c. in his mansion of not less than 8000*l.* value, being pressed by his creditors, conveys, in pursuance of an agreement with his wife, all that his property to trustees for the benefit of his wife and daughters, and subject to his wife's future appointment; in consideration whereof the wife discharged him of above 3000*l.* before raised on the estate, principally for his use, and enabled the trustees to raise, out of her estate, 12.000*l.* more for the benefit of the husband's creditors, but subject to the appointment of him, his executors, &c.; the husband covenanted to deliver an inventory of the goods to the trustees, within six months, which was not done; and after the conveyance the husband continued to use the furniture, &c. as before; and was soon afterwards sued by several of the creditors, whose executions against such goods were satisfied by him without setting up the trust deed, or resorting to the trust fund, but money was raised on it afterwards for other creditors; and above two years after the deed, the husband being sued by the plaintiff (a creditor before that time) the trust deed was set up in bar of the levy upon the goods in the house; and the sheriff returned *nulla bona.* Upon an action brought for a false return, the jury having been directed to consider whether this were a *bona fide* transaction, or a contrivance to defeat the creditors, and having found a verdict for the plaintiff, a new trial was granted, for the purpose of ascertaining more fully the value of the property withdrawn from the creditors, and of that substituted in its stead, and the amount of the debts at the time of the assignment, in order properly to raise the question, whether an assignment, by the terms of which creditors were to be so materially prejudiced, was not a covenous act between the parties thereto, and on that account void as against creditors.

Dewey v. *Bayntun.* 6 E. R. 257

BASTARDS.

1. Bastards are within the meaning of the marriage act, 26 *G.* 2. *c.* 33. which requires the consent of the father, guardian, or mother, to the marriage of persons under age, who are not married by banns.

The King v. *Hodnett.* 1 T. R. 96

2. The rule that a bastard is *nullius filius* applies only to the case of inheritances. 1 T. R. 101

3. The child of a married woman may be proved a bastard by other evidence than that of the husband's non-access, as by evidence of being born during the notorious cohabitation of his mother with another man, and of his being considered by all the family as the child of those two.

Goodright d. Thompson v. *Saul.* 4 T. R. 356

And see *R.* v. *Lubbenham Inhab.* 4 T. R. 251

4. The reputed father or mother is a competent witness to prove the illegitimacy of her children, by proving no marriage, or an illegal one.

R. v. *Bramley. Inhab.* 6 T. R. 330

Standen v. *Standen.* 6 T. R. 331, *n.*

5. An order of bastardy, stated to be made upon the oath of the wife, *as otherwise*, is good; for it will be presumed that the judgment was founded on proof of non-access given by some other than the wife.

R. v. *Luffe.* 8 E. R. 193

6. Such an order, filiating the child of a *married* woman, is good; though it only state that such child was *likely to become chargeable*; which are the words of the stat. 6 *G.* 2. *c.* 31. § 1. as applied to the bastards of *single* women; for upon that statute, as well as the stat. 18 *Eliz. c.* 3. which has the words *born out of lawful matrimony*, the only question is, whether the child be by law a *bastard?* *ib.*

7. Non access of the husband need not be proved during the whole period of the pregnancy: it is sufficient if the circumstances of the case shew a natural impossibility that the husband could be the father; as where he had access only a fortnight before the birth. *Ibid.*

8. An order of bastardy may be made after the death of the woman, upon her examination when taken pregnant, under stat. 6 *G.* 2. *c.* 31.

R. v. *Ravenstone, Inhab.* 5 T. R. 373

R. v. *Clayton.* 3 E. R. 58

9. If a person be bound by a recognizance by one magistrate under stat. 6 *F.* 2. *c.* 31. to appear at the next Sessions and perform such order as shall there be made on him under 18 *Eliz. c* 3. respecting bastards, the Sessions can only make an order of bastardy on him; but cannot order him also to give security for the performance of that order. *R.* v. *Price.* 6 T. R. 147

10. The statute 6 *G.* 2. *c.* 31. only authorizes parish officers to take security from the putative father of a bastard child to *indemnify* the parish: therefore where they had taken a promissory note absolute for a sum certain, and in an action upon the note there was a plea of tender of a lesser sum as the amount of the damage actually sustained by the parish, the issue upon which was found for the defendant; held that the plaintiffs could not recover more. *Cole* v. *Gower.* 6 E. R. 110

11. Where a bastard child is born in a parish, for whose sustenance the parents do not provide necessaries, the parish officers are obliged to do so, without an order of justices.

Hayes & al. v. *Bryant.* 1 H. B. 253

12. If the putative father of a bastard obtain the possession of her from her mother by fraud, the court will order her to be restored to the other.

R. v. *Soper.* 5 T. R. 178

R. v. *Mosely.* 5 E. R. 224, *n.*

13. But, *per* Lord *Kenyon*, where the father has the custody of the child fairly, I do not know that this Court (K. B.) will interfere to take it away from him. 5 E. R. 224 *n.*

14. An illegitimate child, however, in the custody of a friend of the father, was ordered by the Court of C. P. to be delivered up to the mother, though it was not alledged such custody had been obtained unfairly, and though it appeared probable the child would not be brought up so advantageously under her care.

Ex parte Ann Knee. N. R. 148

15. The Court of K. B. granted a habeas corpus to bring up the body of a bastard child, within the age of nurture, for the purpose of restoring it to the custody of the mother, from whose quiet possession it was taken, at one time by fraud, and afterwards by force; but without prejudice to the question of guardianship.

K. v. *Hopkins & Ux.* 7 E. R. 579

BILLS OF EXCHANGE, AND PROMISSORY NOTES.

I. *Acceptance; what shall be, and Acceptor how liable.*

1. Where a bill of exchange was drawn upon *A.* residing in *London*, by a consignor of goods living abroad, and on its being presented for acceptance, *A.* said, he could not then accept, because he did not know whether the ship would arrive at *London* or *Bristol*; on which *B.* the holder agreed to leave it for some time, reserving the liberty of protesting it for non-acceptance, in case *A.* did not accept: on a second application *A.* said, the bill would be paid *even if the ship were lost*; this is only a conditional acceptance, depending on two events: the ship's arriving at *London*, or being lost: and *B.* having the liberty of refusing such conditional acceptance, precludes himself from recovering against *A.* by afterwards noting the bill for non-acceptance.
Sproat v. *Mathews.* 1 T. R. 182
2. Whether an acceptance is conditional or absolute is a question of law.
1 T. R. 182
3. *Semble*, that a letter of attorney given by an executor to *A.*, enabling him to transact the affairs of the testator in the name of the executor as *executor*, and *to pay, discharge, and satisfy all debts due from the testator*, conveys sufficient authority to *A.*, to accept a bill of exchange, in the name of the executor, drawn by a creditor for the amount of a debt due from the testator, so as to make the executor *personally* liable.
Howard v. *Baillie.* 2 H. B. 618
4. But clearly, if the executor admits that such a bill which has been so accepted by *A.*, with the knowledge of the executor, is for a just debt, and that it ought to be paid, it affords sufficient evidence of an authority given by him to *A.*, to accept that particular bill, without resorting to the letter of attorney. 2 H. B. 618
(But see *Gardiner* v. *Baillie.* 6 T. R. 591. tit. EXECUTOR I.)
5. Upon a request to *A.* to accept a bill, and to draw upon *B.* for the same sum, the mere act of drawing upon *B.* does not amount to an acceptance.
Smith v. *Nissen.* 1 T. R. 269
(See ASSUMPSIT V. 12.)
6. Where a bill of exchange payable 40 days after sight is refused acceptance, and an action is brought in order to charge the drawer, proof of the *noting* of the bill for non-acceptance is not sufficient, without proving that it was also protested for non-acceptance, though there be a subsequent protest for non-payment. 2 T. R. 713
7. The acceptance of the drawee is *prima facie* evidence of his having effects of the drawer in his hands. 3 T. R. 183
8. In an action against the acceptor of a bill of exchange, it is necessary to prove the hand-writing of the first indorser, notwithstanding such indorsement was on the bill at the time it was accepted. *Smith* v. *Chester.* 1 T.R. 654
9. An acceptor is only precluded from disputing the hand-writing of the drawer; for which reason the acceptor is liable though the bill be forged.
1 T. R. 654—See DIV. IV. V.
10. *A.*, in consideration of having commissioned *B.* to receive certain *African* bills payable to him, drew a bill upon *B.* for the amount payable to his own order: *B.* acknowledged by letter the receipt of the list of the *African* bills, and that *A.* had drawn for the amount, and assured him that it would meet with due honour from him. This is an acceptance of the bill by *B.*: and the purport of such letter having been communicated by *A.* to third persons, who, on the credit of it, advanced money on the bill to *A.*, who indorsed it to them; held, that *B.* was liable as acceptor in an action by such indorsees, although after the indorsement, in consequence of the *African* bills having been attached in *B.*'s hands, who was ignorant of his letter having been shewn, *A.* wrote to *B.*, advising him not to accept the bill when tendered to him; which, as between *A.* and *B.* would have been a discharge of *B.*'s acceptance if the bill had still remained in *A.*'s hands. *Clarke* v. *Cock.* 4E.R.57
11. A letter from the drawees of a bill in *England* to the drawer in *America*, stating that "their prospect of security being so much improved they *shall accept* or *certainly pay* the bill," is *an acceptance* in law: although the drawees had before refused to accept the bill when presented for acceptance by the holder, who resided in *England*, and again after the writing such letter refused payment of it when presented for payment: and although such letter

written *before* were not received by the drawer in *America* till *after* the bill became due. *Wynne* v. *Raikes*. 5 E. R. 514

12. A mere promise by a debtor to his creditor, that if he would draw a bill upon him at a certain date for the amount of his demand, he should then have the money and would pay it, does not amount in law to an acceptance of the bill when drawn; and an indorsee for a valuable consideration, between whom and the drawee no communication passed at the time of his taking the bill, can neither recover upon the count as for an acceptance, nor on the general counts as for money had and received, &c.

Johnson v. *Collins*. 1 E. R. 98

13. Whether an acceptance of a bill once made by the drawee may or may not be cancelled or recalled by him before the bill be delivered back to the holder, at all events, if the acceptance be so cancelled, and the holder cause the bill to be noted for non-acceptance, he cannot afterwards sue upon it as an acceptance.

Bentinck v. *Dorrien*. 6 E. R. 199

14. A bill of exchange payable to the *order* of *A.*, is payable to *A.* without alleging any order made; and it is sufficient to declare that *A. delivered* the bill to the defendant, which he *accepted*, and by reason of the premises and according to the custom of merchants became liable to pay the contents to *A.*, without alleging a *re-delivery* of the bill by the defendant: for if a re-delivery, or something tantamount, to shew the assent of the drawee to charge himself, be necessary to an acceptance, the demurrer, by admitting the acceptance, impliedly admits the re-delivery, &c.

Smith v. *M'Clure*. 5 E. R. 476

15. If the drawee of a bill goes abroad, leaving an agent in *England*, with power to accept bills, who accepts this for him, the bill, when due, must be presented to the agent for payment, if the drawee continues absent.

Philips v. *Astling & al.* 2 W.P.T.206

II. *Action on Bills, &c.*

1. Debt lies by the *payee* against the *maker* of a promissory note *expressed to be for value received.*

Bishop v. *Young*. 2 B.& P. 78

2. *Sed. qu.* Whether it would if any of these *three* circumstances were varied?

2 B. & P. 84

3. An action of debt will not lie on a promissory note payable by instalments, till the last day of payment be passed.

Rudder v. *Price*. 1 H. B. 547

4. *A.* having declared against *B.* on a promissory note made by *C.* to *A.*, by him indorsed to *B.*, and by him again indorsed to *A.*, judgment was arrested after verdict, on the ground of circuity of action.

Bishop v. *Hayward*. 4 T. R. 470

5. The defendant gave a promissory note to the plaintiff in consideration of the plaintiff's marrying his daughter, which marriage was had in fact, and believed to be valid, and intended to be so by all parties, and after the wife's death the defendant was sued on the note; the jury, presuming a subsequent legal marriage, gave a verdict for the plaintiff, which this court refused to set aside. *Wilkinson* v. *Payne*. 4 T. R. 468

6. A marriage in fact was sufficient to entitle the plaintiff to recover. *Per Buller*, J.: and a marriage may be presumed. 4 T. R. 469, 470 and *Standen* v. *Standen*, *there cited*.

7. If separate actions be brought against the acceptors and indorsers of a bill, the court will stay the proceedings against any of the indorsers on payment of the bill and costs of that action, but not against the acceptor without payment of costs in all the actions. *Smith* v. *Woodcock*. 4 T.R.691

8. The indorsee of a bill of exchange, having received part of the contents from the drawer, cannot recover more than the residue from the acceptor.

Bacon v. *Searles*. 1 H. B. 88

9. Where the drawer pays the whole, the acceptor is entirely discharged, and the bill is no longer negociable.

Beck v. *Robley*. 1 H. B. 89, *n.*

10. The holder of a bill sued the acceptor, and charged him in execution: the latter having obtained his discharge under the Lord's act, the holder then sued the drawer, who, after paying the bill, sued the acceptor, and charged him in execution, which was held to be regular; the defendant's having been charged in execution at the suit of the holder not being a satisfaction as between the drawer and acceptor.

Macdonald v. *Borington*. 4 T. R. 825

11. If the holder, after protest for non-payment, and notice to the drawer, (or after protest only, if the drawer be not entitled to notice), forbear to sue the acceptor, the drawer is not thereby

discharged. *Secùs* before protest, or if the holder take security from the acceptor after protest. *Walwyn & al.* v. *St. Quintin.* 1 B. & P. 652

12. If the holder receive part payment of the indorser, he may still recover the residue against the drawer, if not the whole. 1 B. & P. 652

13. If the holder give time to the acceptor of a bill of exchange, or drawer of a promissory note, after it has been dishonoured, the indorser is discharged.

Tindal & al. v. *Brown.* 1 T. R. 167 (Affirmed in *Cam. Scac.* 2 T. R. 186.)

14. If the holder of a bill when due, after taking part payment from the acceptor, agree to take a new acceptance from him for the remainder, payable at a future date, and that in the mean time the holder shall keep the original bill in his hands as a security; such agreement amounts to giving time and a new credit to the acceptor, and discharges the indorser, who was no party to the agreement; though the drawer might have had no effects in the hands of the acceptor.

Gould v. *Robson.* 8 E. R. 576

15. So if he take a new security from him for the amount, with the exception of a nominal sum only.

English v. *Darley.* 2 B. & P. 61

16. But if the holder of a bill of exchange, of which payment has been refused, inform the drawer of his intention to take security from the acceptor, and the drawer answer, that he may do as he likes, for that he (the drawer) is discharged for want of notice, and it appear that due notice has been given; the holder may sue the drawer, notwithstanding that he has taken security from the acceptor; for the drawer under such circumstances must be considered as having assented to the security being taken.

Clark v. *Devlin.* 3 B. & P. 363

17. *A.* being partner with *B.* in one mercantile house, and with *C.* in another; the house of *A.* and *B.* indorse a bill of exchange to the house of *A.* and *C.*, after which *B.* acting for the house of *A.* and *B.*, receives securities to a large amount from the drawer of the bill upon an agreement by *B.* that the bill should be taken up and liquidated by *B*'s house, and if not paid by the acceptors when due should be returned to the drawer. The Court of K. B. held that the securities being paid, and the money received by *B.* in satisfaction of the bill, *A.* was bound by this act of his partner *B.* in all respects, and therefore that he could not in conjunction with *C.*, his partner in the other house, maintain an action as indorsees and holders of the bill against the acceptors, after such satisfaction received through the medium of, and by agreement with *B.*, in discharge of the same.

Jacaud & al. v. *French & al.* 12 E. R. 317

18. Where a promissory note, after it was due and had been noted for non-payment, was indorsed to the plaintiff, who sued the maker upon it, the latter was allowed to go into evidence to shew that the note was paid as between him and the original payee, from whom the plaintiff received it.

Brown v. *Davies.* 3 T. R. 80

19. The same rule holds in all cases where the note is indorsed to one after it is due. *ib.* and *Taylor* v. *Matthews, E.* 27 *G.* 3. 3 T. R. 83. *n.* (And see *Brown* v. *Turner.* 7 T. R. 630

20. But it is no defence to an action by an indorser of a bill of exchange to plead that it was accepted for the accommodation of the drawer without a consideration, and was indorsed over after it became due.

Charles v. *Marsden.* 1 W. P. T. 224

21. One who had committed a secret act of bankruptcy procures the defendant to lend him his acceptance, and as a security pledges the lease of his house; and having drawn the bill payable to his own order, indorses it to the plaintiff for a valuable consideration, without notice of his bankruptcy: held that, in an action by the plaintiff, as indorsee, against the acceptor, the latter could not defend himself on the ground of the drawer's bankruptcy at the time of such indorsement, or because the assignees had withdrawn from him the lease deposited as a security.

Arden v. *Watkins.* 3 E. R. 317

22. *A.* deposited a sum of money at the banking-house of *B.* in *Paris*, for which *B.* gave him his note "payable in *Paris*, or at the choice of the bearer at the Union Bank in *Dover*, or at my usual residence in *London* according to the course of exchange upon *Paris*;" after this notice was given, the direct course of exchange between *London* and *Paris* ceased altogether, having been, previous to its total cessation, extremely low; the note was at a subsequent period presented for acceptance

and payment at the residence of *B.* in *London*, at which time there was a circuitous course of exchange upon *Paris* by way of *Hamburgh:* held, that *A.* was entitled to recover upon the note according to such circuitous course of exchange upon *Paris* at the time when the note was presented.

Pollard v. *Herries.* 8 B. & P. 335 (See 2 H. B. 378. *post*, IX.)

23. An action lies by the indorsee against the indorser upon a bill of exchange immediately on the non-acceptance by the drawee, though the time for which the bill was drawn be not elapsed.

Ballingalls v. *Gloster.* 3 E. R. 481

24. The holder of a bill before it was due having tendered it for acceptance, which was refused, kept it till due, when it was tendered for payment and refused, and then immediately returned it on the second indorser, who, not knowing of the laches, took up the bill: the Court of K. B. held that his ignorance when he paid the bill, of the laches of the former holder, did not entitle him to recover against the first indorser who set up such defence.

Roscow v. *Hardy.* 12 E. R. 434

III. *Days of Grace.*

1. Three day's grace are allowed on inland as well as on foreign bills of exchange, and on promissory notes; for stat. 3 & 4 *Ann. c.* 9. puts the latter on the same footing as inland bills of exchange in all respects.

Brown v. *Haraden.* 4 T. R. 151

2. *Quere*, Whether the acceptor of an inland bill be bound to pay it on demand at any reasonable time on the third day of grace, or whether he be allowed the whole of that day to pay it in? For the court will not take notice of banking hours.

Leftley v. *Mills.* 4 T. R. 170

3. Three days' grace are allowed on a promissory note payable to *A.*, without adding "or to his order," "or to bearer." *Smith* v. *Kendall.* 6 T. R. 123

IV. *Fictitious Bills, or Notes.*

1. Where a bill of exchange was drawn by the defendant and others on the defendant alone, payable to a fictitious person (which was known to all the parties concerned in drawing the bill), and the defendant received the value of it from the second indorser; it was held that a *bonâ fide* holder for a valuable consideration might recover the amount of it in an action against the acceptor for money paid, or money had and received.

Tatlock v. *Harris.* 3 T. R. 174

2. It was considered as an agreement by all parties to appropriate so much property to the account of the holder.

3 T. R. 182

3. A bill so drawn is in its legal operation payable to *bearer*, and may be declared on as such; *semb.*

Vere v. *Lewis.* 3. T. R. 182

4. *A.* having signed his name to a blank paper duly stamped, and delivered it to *B.* for the purpose of drawing a bill of exchange in such manner as *B.* shall think fit, *B.* draws a bill payable to *a fictitious payee or order*, and indorses it for a valuable consideration to *C.*, who is ignorant of the transaction between *A.* and *B.*: *C.* may maintain an action against *A.* as the drawer of a bill *payable to bearer*, on a count to that effect.

Collis & al. v. *Emmett.* 1 H. B. 313

5. Or, *C.* may recover on a count stating the special circumstances.

1 H. B. 313

6. If a bill of exchange be drawn in favour of a *fictitious payee or order*, with the *knowledge of the acceptor* as well as the *drawer*, and the name of such fictitious payee be indorsed on it by the drawer *with the knowledge of the acceptor*, which fictitious indorsement purports to be to the *drawer himself, or his order*, and then the drawer indorses the bill to an innocent indorsee for a valuable consideration, and *afterwards* the bill is accepted, but it *does not appear that there was an intent to defraud any particular person;* such innocent indorsee for a valuable consideration may recover against the acceptor, *as on a bill payable to bearer. Gibson and Johnson* v. *Minet and Fector.* 3 T. R. 481. affirmed in *Dom. Proc.* 1 H. B. 569.—625. See also, 2 H. B. 187.—211.; and 288.—298.

7. Perhaps also in such case the innocent indorsee might recover against the acceptor, as on a bill *payable to the order of the drawer.* 1 H. B. 569

8. Or, on a count stating the special circumstances. 1 H. B. 569

9. A bond conditioned to pay costs on 29th *November* in Cumberland, when taxed by the Master of K. B. is forfeited by non-payment, though in fact the costs were only taxed on the 25th of *November*, of which the defendant

had no notice on or before the 29th, for the defendant might have had them taken before, and thus have known their amount in time. *Bigland & al.* v. *Skelton & al.* 12 E. R. 436

V. *Bills or Notes, forged or altered.*

1. In an action by the indorsee against the acceptor of a bill drawn payable "to *A.* or order," the defendant may shew that the person who indorsed to the plaintiff, was not the real payee, though his name were the same, and though there were no addition to the name of the payee on the bill. *Mead* v. *Young.* 4 T. R 28
2. If a bill, payable to *A.* or order, get into the hands of another person of the same name as the payee, and such person, knowing that he is not the real person in whose favour it was drawn, indorse it, he is guilty of forgery. 4 T. R. 28
3. An alteration of the date of a bill of exchange after acceptance, whereby the payment would be accelerated, avoids the instrument; and no action can be afterwards brought upon it even by an innocent indorsee for a valuable consideration. *Master* v. *Miller.* 4 T. R. 320. (Affirmed in *Cam. Scac.* 5 T. R. 367 : 2 H. B. 141 : 1 Anstr. 225.
4. If upon a bill being presented for acceptance the drawee alter it as to the time of payment and accept it so altered he vacates the bill as against the drawer and indorsers: but if the holder acquiesces in such alteration and acceptance it is a good bill as against the holder and acceptor. *Paton* v. *Winter.* 1 W. P. T. 420
5. And the holder cannot afterwards maintain an action on the case against the acceptor for thereby rendering the bill invalid; especially after having kept it and presented it for payment at the deferred period. *ib.*
6. A bill was drawn on a proper stamp, dated 2d of *September*, payable 21 days after date: it was afterwards altered and made payable 51 days after date; and on the 30th of *September* was again altered to 21 days after date, and the date brought forward to the 14th of *September*; held, that the bill should have had a new stamp, though the alterations were made with the consent of the acceptor before the bill was negotiated. *Bowman* v. *Nicholl.* 5 T. R. 537

VI. *Negotiable Bills or Notes; what shall be so considered.*

1. A bill of exchange, payable on a contingency, cannot be declared on as a negotiable instrument. *Carlos* v. *Fancourt (in error).* 5 T. R. 482
2. Nor a promissory note; for the stat. 3 & 4 *An. c.* 9. puts promissory notes on the same footing with bills of exchange in all respects. 5 T. R. 482
3. A note promising to pay "on the sale, or produce immediately when sold, of the *White Hart Inn St. Alban's Herts*, and the goods, &c. value received," cannot be declared upon as a promissory note within the statute, though it be averred that before the action commenced the Inn and the goods were sold. *Hill* v. *Halford (in error) In Cam. Scac.* 2 B. & P. 413
4. A note, by which *A.* promises to pay to the bearer 50*l.* "being the portion of a value, as under, deposited in security for the payment thereof," may be declared upon as a promissory note. *Haussoullier* v. *Hartsink.* 7 T. R. 337
5. A note payable on demand, with interest, drawn by *A.* in favour of *B.* as a security for a debt, was by him indorsed to *C.* for the same purpose; after the indorsement it passed backwards and forwards between *B.* and *C.* several times, and previous to its being ultimately deposited with *C.* he received an intimation from *B.* not to negotiate it, as he should want it when he settled accounts with *A.*; held, that *C.* could not, after a settlement of accounts between *A.* and *B.*, without a re-delivery of the note, recover on it against *A.* *Roberts & al. (Assignees)* v. *Eden.* 1 B. & P. 598

VII. *Notice; what necessary, and in what Cases.*

1. Notice of a bill of exchange, or promissory note being dishonoured, must come from the holder. *Tindel & al.* v. *Brown.* 1 T. R, 167
2. What is reasonable notice to the indorser of non-payment by the drawer of a promissory note, or acceptor of a bill of exchange, is a question of law arising from the particular facts. (See 7. *post.*) 1 T. R. 167
3. Where the note became due on the 5th *October*, and the indorsee's clerk called on the drawer *Donaldson*, at 10 o'clock in the morning, and not finding him at home, left word that the drawer would send for it to his mas-

ter's and take it up: and on the 6th called again on the drawer, who told him he would take it up that day within the banking hours, which not being done, the other called on the drawer again on the 7th, and not finding him at home, then tendered it to the indorser; and all the parties lived within 20 minutes walk of each other; the indorser was discharged by the laches of the holder, notwithstanding he had notice from the *drawer* on the 6th that he could not pay it. 1 T.R. 167

4. In this case, even if the notice had been given on the 6th, it would have been too late, because the plaintiffs had given credit to the drawer. 1 T.R. 171

5. Where the drawer of a promissory note, or the acceptor of a bill of exchange, do not live in the same place, the holder must write by the next post after the bill is dishonoured. 1 T.R. 168

6. Notice of the dishonour of a bill in *London* was sent by the post to the holder in *Manchester*, where the letter was delivered out between eight and nine in the morning; the post from thence for *Liverpool*, where the drawer lived, went out at noon, between twelve and one; the holder did not send notice to the drawer the same day, nor by the post of the succeeding day, but by a private hand on the latter day, who did not deliver it till two hours after the post delivery, and about one hour before the post left *Liverpool* for *London*: held, that the holder had made the bill his own by his laches. For whether *reasonable notice* be a question of law or of fact, and whether or not the law require notice to a party living at another place by the *next* post (by which must be understood the next post by which it is practicable to give notice: and whether or not four hours be a sufficient interval for that purpose); at all events the holder ought to have written at farthest by the *post* of the succeeding day.

Darbyshire v. *Parker*. 6 E. R. 3.

7. The circumstances under which a notice was given in any particular case, are to be ascertained by a jury; but whether under such circumstances notice were given in a *reasonable* time, is a question of law, on which they ought to receive the direction of the judge.

6 E. R. 10. 11. 12

(And see 2. and *Wilks* 204. 6. cited 6 E. R. 12.; *accord.* and *post*, 9. 10. & 26. *contra.*)

8. The general rule as collected from the cases seems to be, that with respect to persons living in the same town the notice shall be given by the *next day*: and with respect to persons living at different places by the *next post*; leaving parties in particular cases, where compliance with such latter part of the rule cannot reasonably be expected, to account for their non-compliance with it. 6 E. R. 10. 11. 12

9. Where a bill of exchange passed through the hands of five persons, all of whom lived in or near *London*, and the bill being dishonoured, the holder gave notice on the same day to the fifth indorser, and he on the next day to the second, and he on the same day to the first; the Court (K. B.) were of opinion, on a case finding these facts, that due diligence had been used: and Lord *Kenyon* thought the question of due diligence was proper to be left to the jury; on which the other judges gave no opinion. *Hilton* v. *Shepherd*, *K. B. E.* 16 *G.* 3. 6 E. R. 14, *n.*

10. *Dubitatur* by Lord *Kenyon*, whether the question of *reasonable notice* as to the dishonour of a bill of exchange be not a question of fact to be submitted to the jury under all the circumstances of the case. But though the holder may have lost his remedy against the drawer through want of notice (and notice *by the drawee* to the drawer the next day will not suffice for notice *by the holder*), yet a subsequent promise by the drawer to the holder, that *he will see the bill paid*, will support an assumpsit. *Hopes* v. *Alder*, *K. B. M.* 40 *G.* 3. (See 17 & 23.) 6 E. R. 16, *n.*

11. In action against the drawer of a bill of exchange in consequence of the acceptor's default, the court left it to the jury to presume from circumstances (such as the payment of a part of a bill without any objection to want of notice) that due notice was regularly given.

Horford v. *Wilson* 1 W. P. T. 12

12. A bill indorsed in blank, and deposited by the holder with his bankers, became due on *Saturday*, and was presented for payment about two o'clock on that day; payment being refused, the bill was noted and again presented between nine and ten in the evening by a notary; on *Monday* the bankers informed the holder that the bill was dishonoured, who *on that day* about noon gave notice to the indorser; the holder lived at *Knightsbridge*, and the

indorser in *Tottenham-Court-Road*: held that this notice was sufficient to entitle the holder to recover against the indorser. *Haynes* v. *Birks*. 3 B.&P.599

13 Where the indorsee of a bill of exchange lodged it with his bankers, in the city of *London*, who presented it for payment on the 4th, when it was dishonoured: and on the 5th they returned it to the indorsee, who gave notice to the drawer, who resided at *Shadwell*, of the dishonour on the 6th by the two-penny post: the Court of K. B. held such notice to be reasonable. *Scott* v. *Lifford*. 9 E. R. 347

14. Notice of non-payment given by an indorser, living in *Holborn*, to an indorsee living at *Islington*, by nine at night of the day following that on which the first indorser knew, was held reasonable notice.

Jameson v. *Swinton*. 2 W. P. T. 224

15. Notice of a bill's being dishonoured by the drawee by non-payment, is not necessary to be given to the drawer, if he has no effects in the hands of the drawee either at the time of drawing or when the bill becomes due.

Bickerdike & al. v. *Bollman*. 1 T.R.405

16. This rule proceeds upon the ground of a supposed fraud in the drawer.

3 B. & B. 242

17. Notice of non-payment by the acceptor need not be given to the drawer, if the latter have no effects in the hands of the former, though the indorser have. 1 B. & P. 652

18. The objection arising from want of notice of non-acceptance of a bill of exchange from the holder to the drawer, is done away by shewing that the latter had no effects in the hands of the drawee at the time.

Rogers v. *Stephens*. 2 T. R. 713

19. *Quere*, How far this rule holds. if the drawer shew from other circumstances that in fact he sustained an injury for want of such notice. 2T.R.713

20. But at any rate a subsequent promise by the drawer to pay the bill is a waver of the want of notice.

(See *ante* 10, and *post* 23.) 2 T. R. 713

21. And if, on demand made, he answer that "the bill must be paid," it is equivalent to a promise to pay.

2 T. R. 713

22. An indorsee, long after a bill became due, demanded payment of the indorser, who first *promised to pay it if he would call again*, and in a day or two being called upon again for payment, said, that he had not had regular notice, *but as the debt was justly due he would pay it*: held that such promises were evidence that the bill had been presented in due time and dishonoured, and that due notice had been given of it to the indorsee, and superseded the necessity of any further proof.

Lundie v. *Robertson*. 7 E. R. 231

23. *A.* makes a promissory note payable to *B.* or order, which *B.* indorses, having given no value for it, and knowing that *A.* is insolvent; in an action by the indorsee against *B.*, it is not necessary to prove that the note was presented for payment to *A.* immediately when it became due, or that notice was given to *B.* of *A's* refusal to pay it. *De Berdt* v. *Atkinson*. 2HB.336

24. *A.* being in insolvent circumstances, *B.* undertakes to be a security for a debt owing from *A.* to *C.*, by indorsing a promissory note made by *A.* payable to *B.*, at the house of *D.*; the note is accordingly so made and indorsed with the knowledge of all parties; just before it becomes due, *B.* being informed that *D.* has no effects of *A.* in his hands, desires *D.* to send the note to him *B.*, and says he will pay it, having then a fund in his hands for that purpose; the note is not presented at *B's* house till three days after it is due; *C.* cannot maintain an action against *B.* on the note, not having used due diligence in presenting the note as soon as it was due to *D.* for payment, and in giving immediate notice to *B.* of the non-payment by *D.*; for *B.* has a right to insist on the strict rule of law respecting the indorser of a note, notwithstanding the particular circumstances of the case.

Nicholson v. *Gouthit*. 2 H. B. 609

25. Upon a guaranty of the price of goods, to be paid by a bill, due notice of the non-payment of the bill must be given both to the drawer and guarantee, unless both drawer and acceptor are bankrupts when the bill becomes due.

Philips v. *Astling & al.* 2 W. P.T.206

26. The vendee of goods having accepted a bill of exchange for the price of them, and becoming bankrupt before the bill became due, a guarantee who paid the vendor after the bankruptcy of the vendee may recover back the money from the latter, without proving that any demand was made upon

him as acceptor of the bill, before such payment by the guarantee; this not being an action upon the bill itself; and the notorious insolvency of the vendee acceptor being at least a *primâ facie* warrant to the guarantee to dispense with the making of such demand by the vendor who held the bill.

Warrington v. *Furber*. 8 E. R. 242

27. *A.*, the agent in *America* of *B.* in *England*, drew a bill upon him, and indorsed it to *C.*, also residing in *America*, who indorsed it over. Before the bill became due, *A.* having reason to believe that *B.* would fail, lodged property belonging to *B.* in the hands of *C.* to answer the bill in case it should be returned; *C.* undertaking to restore the same whenever it should appear that he was exonerated from the bill. Acceptance and payment of the bill were refused, but no notice was given to *A.*: held that *A.* was discharged.

Clegg v. *Cotton*. 3 B. & P. 239

28. If the indorsee of an inland bill, not due, present it for acceptance, which is refused, and delay giving notice to his indorser, the indorser will be discharged. *Goodall* v. *Dolley*. 1 T.R. 712

29. And a subsequent proposal by the indorser to pay the bill by instalments, made without the knowledge of the indorsee's laches, is not a waver of the want of notice. 1 T. R. 712

30. Though the indorsers of a bill of exchange had full knowledge of the bankruptcy of the drawer, and of the insolvency of the acceptor, before and at the time when the bill became due; and, within a day after, notice might (but for a mistake of the holders) in due course have reached them from the holders, communicating such their knowledge to the bankers in *Liverpool*, with whom they had before discounted the bill, and who had transmitted it to the holders in *London*; yet that did not dispense with such holders giving notice of the dishonour in due time to the indorsers.

Esdaile v. *Sowerby*. 11 E. R. 114

31. The purchaser of a foreign bill of exchange, payable at a certain time after sight, which is publicly offered for negociation, is *not* bound to send it by the *earliest* opportunity to the place of its destination.

Muilman v. *D'Eguino*. 2 H. B. 565 (See 6 E. R. 7.)

32. There is no fixed time when a bill, drawn payable at sight, or a certain time after, shall be presented to the drawee, but it must be presented within a *reasonable time*. 2 H.B. 565

33. What is a reasonable time, is a question for the jury to decide, from the circumstances of the case. (See *ante* ART. 7, &c.) 2 H. B. 565

34. But *semble*, that if the holder of a bill so payable, neither presents it nor puts *it in circulation*, he is guilty of *laches*, and cannot recover upon it. 2 H. B. 565

35. If a bill be accepted payable at *A's*, who is the acceptor's banker, the party taking such special acceptance, is bound to present it for payment *within the usual banking hours* at such banker's, and if he present it after such hours without effect, it is no evidence of the dishonour of the bill so as to charge the drawer.

Parker v. *Gordon*. 7 E. R. 385

36. It is sufficient, if notice of a bill drawn in *England* on a person in the *East Indies*, being dishonoured, is sent to *England* by the first *direct* and *regular* mode of conveyance, whether it be by an *English* or a foreign ship; the holder is not bound to send such notice by the accidental, though earlier conveyance of a foreign ship, not destined to this country. 2 H. B. 565

37. *A.* makes a promissory note payable to *B.*, or order, with a memorandum upon it that it will be paid at the house of *C.*, who is *A's* banker; in the course of business the note is indorsed to *C.* In an action by *C.* against the indorser, it is not necessary to prove an actual demand on *A.*

Saunderson v. *Judge*. 2 H. B. 509

38. If a note be made payable at a particular house, a demand of payment at that house is a demand on the maker. 2 H. B. 509

39. The putting a letter into the post-office to the indorser in proper time, informing him that the maker has not paid a note when due, is sufficient evidence of notice to such indorser. 2 H. B. 509

40. In an action on a promissory note by the indorsee against the maker, notice of the indorsement need not be averred. *Reynolds* v. *Davies* in Error. 1 B. & P. 625

41. The want of due notice of the dishonour of a bill is answered by shewing the holder's ignorance of the place of residence of the prior indorser when he sues; and whether he used due dili-

gence to find out the place of residence is a question of fact to be left to the jury. *Bateman* v. *Joseph.* 12 E. R. 433

VIII. *Protest; where necessary.*

1. The provisions of stat. 3 & 10 *W.* 3. *c.* 17. respecting protests of inland bills, do not apply to such bills as are made payable after *sight.*
Leftley v. *Mills.* 4 T. R. 170
2. Therefore an acceptor of such a bill, who refuses payment on the third day of grace, is not liable to any charge for the noting of the bill. 4 T. R. 170
3. Noting is unknown to the law as distinguished from the protest, of which it is merely a preliminary step.
4 T. R. 170
4. In an action against the drawer of a foreign bill of exchange a protest for non-acceptance must be proved.
Gale v. *Walsh.* 5 T. R. 239
5. Where it appeared that at the time of drawing a foreign bill of exchange the drawer had effects in the hands of the drawee, but which were taken out of his hands by the drawer before the bill became due; held that a protest for non-acceptance and notice thereof to the drawer by the drawee, is necessary to enable the payee to recover against the drawer.
Orr & al. v. *Maginnis.* 7 E. R. 359
6. A bill of exchange payable 60 days *after sight* becomes due 60 days after acceptance, or after protest for non-acceptance, and may, when due, be protested for non-payment. 6T.R. 200
7. Several bills were drawn by *A.* in *England* on persons in *India*, payable 60 days after sight, and bonds given to *C.*, (the indorsee), with condition to be void if the bills should be paid in the *East Indies*, or paid here by the obligor within 30 days after the bills should be produced to him after being sent back here *protested for non-payment;* before the bills arrived in the *East Indies*, the drawers had left that place, and their agents refused to accept them when they did arrive: the bills were then protested in *India* for *non-acceptance*, and sent back to *England* so protested: some of these being presented to one of the drawees, who was then in *England*, for payment, were protested for *non-payment* here. In debt on the bonds the Court of C. P. held, that with respect to the bills returned protested for non-acceptance and not presented and protested for non-payment here, the obligor was not liable; but for those which were so protested for non-payment here, he was liable; this being a substantial performance by the obligee of his undertaking according to the condition of the bonds; and the court gave judgment on the several counts accordingly; on two for the plaintiffs, and on one for the defendant.
French & al. v. *Campbell.* 2 H. B. 163
8. On the judgment on the two counts for the plaintiffs, the defendant brought a writ of error in K. B., and that court, holding that the undertaking on the part of the plaintiffs ought to have been *literally* complied with, *reversed the judgment of the Court of* C. P. on those counts; and intimated their concurrence with the Court of C. P. on the other count. *Campbell* v. *French (in Error).* 6 T. R. 200

IX. *Void, illegal, or unproductive.*

1. If a draft or bill given in payment of a debt be dishonoured, the party receiving it may consider it as a nullity, and act accordingly.
Puckford v. *Maxwell.* 6 T. R. 52
2. *A.* wishing to send goods to *B.* at *X.* employed *C.* to carry and deliver them to *B.*, and engaged to pay *C.* for the freight: *C.* on delivering them according to the order, took a bill of exchange from *B.* drawn on *A.*, which bill was never paid; held that *A.* was liable to pay the amount of the freight to *C.* notwithstanding the bill of exchange.
Tapley v. *Martens.* 8 T. R. 451
3. If the seller of goods take notes or bills for them, without agreeing to run the risk of the notes being paid, and the notes turn out to be worth nothing, this will not be considered as payment.
Owenson v. *Morse.* 7 T. R. 64
4. Assumpsit for goods sold and delivered. Plaintiff (below) proved, that having sold goods to the defendant, he received from him a check upon *J. S.* a banker, directing the latter, two months after date, to pay to the plaintiff a bill at two months for the amount of the goods; that the plaintiff and defendant both kept accounts with *J. S.*, and the check was indorsed by the plaintiff, and paid by him into the banking-house of *J. S.*, who entered it short in the plaintiff's account; that on the 18th of *March* 1793, *J. S.* became bankrupt; that between the payment

of the check into the house of *J. S.* and the bankruptcy of *J. S.*, no settlement of accounts between the plaintiff and *J. S.* had taken place, nor was the amount of the check ever carried out as cash, though in that interval plaintiff had overdrawn his account. The defendant offered to prove that between the payment of the check into the house of *J. S.* and the bankruptcy of *J. S.* the account between *him* and *J. S.* was settled, at which time he was debited for the whole amount of the check, and credited for interest thereon from the day of settlement to the day when the bill, mentioned in the check, if drawn, would have become due: held, 1st, that the check did not, under all the circumstances, amount to payment for the goods; 2dly, that the evidence offered by the defendant was not admissible.

Brown v. *Kewley. (in Error.)* In *Cam. Scac.* 2 B. & P. 518

5. Where the drawers of a banker's check or inland bill of exchange issued it nine months after it bore date, upon a consideration which afterwards failed, as between them and the persons to whom they delivered it, they cannot be permitted to object this circumstance in an action brought by a subsequent holder for a valuable consideration and without notice; though by the general rule, any person receiving a negociable instrument after it is due is deemed to have taken it upon the credit of the person from whom he received it, and subject to the same equities as between him and the party sued on such instrument.

Boehm v. *Sterling.* 7 T. R. 423

6. In an action by an indorsee of a bill of exchange against the acceptor, the latter may call the payee as a witness to prove that the bill was void in its creation.

Jordaine v. *Lashbrook.* 7 T. R. 601

7. *A.* being employed as a broker for *B.* in stock-jobbing transactions, paid the differences for him; a dispute arising between them respecting the amount of *A*'s demand, the matter was referred to *C.*, who awarded 306*l.* to be due; on which *A.* drew on *B.* for 100*l.*, part of the above, and indorsed the bill to *C.* after *B.* had accepted it: held that *C.* could not recover on the bill, for the bill itself was given for the illegal demand, and *C.* was privy to it. *Steers* v. *Lashley.* 6 T. R. 61 And see *Bevan* v. *Turner.* 7 T. R. 630

8. A broker agreed to get certain bills discounted, and that he should retain out of the money so raised the exorbitant brokerage of 10*s.* per cent.; but he was not to advance the money himself, nor was his name on the bills: the Court of K. B. held that a bill negociated by the broker, upon these terms, could not be avoided in the hands of an innocent indorsee, as being a security for an usurious consideration within the stat. 12 *Ann. c.* 16.; the person advancing the money having received no more than legal interest, though the broker received exorbitant brokerage for his trouble in getting the bill discounted.

Dagnall v. *Wigley.* 11 E. R. 43

9. No action can be maintained by the plaintiff on a note given to him by the defendant as an apprentice-fee with his son, who was to be bound to the plaintiff, if it appeared that the indenture executed was void by the stat. 8 *Ann. c.* 9. for want of the insertion of such premium therein, and a proper stamp in respect of the same; although the plaintiff did in fact maintain the apprentice for some time, and until he absconded.

Jackson v. *Harwick.* 7 T. R. 121

10. *A.* a merchant in *London*, draws a bill of exchange on *B.* at *Pisa*, payable to the order of *C.* a *French merchant resident in France*; *C.* indorses it to *D.* at *Nice*; and *D.* to *E.* at *Leghorn*; the bill not being paid when due, *E.* draws another bill for the amount of the former on *A.* in favour of *F.* of *Leghorn*, which is indorsed to *G.* a merchant in *London*, in the course of trade, and accepted by *A.* The stat. 34 *G.* 3. *c.* 9. § 4. prevents *G.* from maintaining an action on the latter bill against *A.*; and if such action be brought, the court will stay the proceedings.

Bendelack v. *Morrier.* 2 H. B. 338

11. *A.* in *England* draws a bill of exchange on *B.* in a foreign country, which, after having been negociated through another foreign country, is presented to *B.* who refuses to pay it, on account of the law of the country in which he resides having prohibited such payment; the drawer is liable for the whole amount of the *re-change* between the different countries.

Mellish v. *Simeon.* 2 H. B. 378 (And see *ante* II. 19.)

12. A warrant was directed to an officer of excise by the commissioners, com-

manding him to apprehend a person convicted in several penalties, and take him to prison, and keep him there until the amount of the penalties was paid; the officer having arrested the party, discharged him on a promissory note for the amount of the penalties payable at a future day; and the commissioners afterwards approved of his conduct: held that the discharge was a good consideration for the note, and that an action might be maintained thereon.

Pilkington v. *Green*. 2 B. & P. 151

13. A promissory note for the amount of the fair expenses of the prosecution, agreed to be given at the recommendation of the Court of Quarter Sessions by a defendant who stood convicted before them of a misdemeanor, for which the parish officers had been bound over by recognizance to prosecute him under the stat. 32 *G.* 3. *c.* 57.; and the giving of which security was considered by the court, in abatement of the period of imprisonment to which he would otherwise have been sentenced; is legal, and may be enforced by action.

Bayley v. *Wingfield*. 11 E. R. 46

BILLS OF LADING;

(AND CONSIGNMENT.)

1. A bill of lading is the written evidence of a contract for the carriage and delivery of goods sent by sea for a certain freight. 1 H. B. 359
2. Bills of lading are transferable and negotiable by the custom of merchants.

Lickbarrow v. *Mason*. 5 T. R. 683

3. The indorsement and delivery of a bill of lading is *primâ facie* an immediate transfer of the legal interest in the cargo. 1 T. R. 215, 216.

And *Hibbert* v. *Carter*. 1 T. R. 745

4. Bills of lading are negotiated and transferred by the shipper's indorsement; and when such bills of lading are transmitted from abroad, it is usual for merchants to accept bills in consequence of them before the arrival of the goods.

Haille v. *Smith*. 1 B. & P. 564

5. There is no distinction between a bill of lading indorsed in blank and an indorsement to a particular person. 2 T. R. 63
6. Where several bills of lading of different imports have been signed, no reference is to be had to the time when they were signed, by the captain; but the person who first gets legal possession of one of them, by delivery from the owner or shipper, has a right to the consignment.

Caldwell & al. v. *Ball*. 1 T. R. 205

7. And where such bills of lading, though different upon the face of them, are constructively the same, and the captain has acted *bonâ fide*, a delivery according to such legal title will discharge him from them all. 1 T. R. 205
8. Where the consignor of goods abroad advised the consignee by letter that he had chartered a certain ship on his account, and inclosed him an *invoice* of the goods laden on board, which were therein expressed to be *for account and risk* of the consignee, and also a bill of lading in the usual form expressing the delivery to be made to order, &c. *he paying freight for the said goods according to charter party;* and the letter of advice also informed the consignee that the consignor had drawn bills on him at three months for the value of the cargo; held that the invoice and bill of lading sent to the consignee, and the delivery of the goods to the captain, vested the property in the consignee, subject only to be devested by the consignor's right to stop the goods *in transitu* in case of the insolvency of the other. And the consignor's agent having obtained possession of the cargo under another bill of lading, and having refused to deliver it up unless the consignee would make immediate payment, which he declined doing, but offered his acceptances at three months in the manner before stipulated; held that the consignee might maintain trover against such agent without having tendered payment of the freight either to him or the captain, the defendant having possessed himself of the goods wrongfully. *Walley* v. *Montgomery*. 3 E. R. 585
9. The consignor of goods abroad, upon receipt of orders from a correspondent here, ships goods on account and at the risk of the consignee, and takes bills of lading from the captain making the goods deliverable to the consignor's own order, and transmits one of such bills *unindorsed*, with the invoice, to the consignee, inclosed in a letter informing him that he had drawn upon him for the amount; which he doubted not would meet

due honour, and close the account; and the consignor, by way of precaution, also sent another bill of lading, *indorsed*, to his own agent. Held that upon the shipment, *on account and at the risk of the consignee*, the property in the goods vested in him, subject only to be devested by the consignor's stopping them while *in transitu*; and that upon the arrival of the goods, the consignee having obtained possession of them from the captain by the production of his *un indorsed* bill of lading, the property became absolute in the consignee, however wrongfully parted with by the captain without a competent authority from the shipper, and however answerable the captain might be to the shipper on that account.

Coxe v. *Harden.* 4 E. R. 211

10. *Quere*, whether the mere indorsement of a bill of lading to an agent to enable him to receive the goods on account of the principal, without any consideration, will enable such agent to maintain trover in his own name for the goods? *Semble* not. *ib.*

11. An assignment of goods at sea as a security for a debt, and a subsequent indorsement of a bill of lading, are good as against the assignees of the assignor, who committed an act of bankruptcy between the assignment of the goods and the indorsement of the bill of lading.

Lempriere v. *Pasley.* 2 T. R. 485

12. The consignor may stop goods *in transitu* before they get into the hands of the consignee, in case of the insolvency of the latter: but if the consignee assign the bills of lading to a third person for a valuable consideration, the right of the consignor as against such assignee is devested.

Lickbarrow v. *Mason.* 2 T. R 63

This decision was reversed in the Exchequer-chamber, 1 H. B. 357. and being from thence carried to the House of Lords, the judgment of the Exchequer-chamber was there reversed, and a *venire de novo* awarded in *T.* 33 *G.* 3. 2 H. B. 211. 5 T. R. 367.—On this second trial a special verdict was found: and the Court of K. B., without discussing the question anew, declared that they retained their former opinion.

5 T. R. 683, and see 6 T. R. 131

See an account of this case, and a very full note of Mr. Justice Buller's opinion delivered upon it in the House of Lords. 6 E. R. 20—36, *n.*

13. Where goods were consigned on the joint account of the consignors and consignee, and a bill of lading was sent to deliver the goods to the consignee, or his assigns: who afterwards indorsed and delivered it to the defendants upon condition of their making an advance to him on it, which they failed to do, but claimed to retain it as a security for prior advances: held that such indorsement and delivery of the bill of lading did not devest the consignor's right to stop the goods *in transitu*, upon the insolvency of the consignee, who had not paid for them.

Newsom v. *Thornton.* 6 E. R. 17

14. Where a consignee, to whom the bill of lading was indorsed in blank, assigned it over as a security for acceptances given by the assignee not amounting to the value of the goods, and afterwards by an agreement between them they became partners in the goods, by which agreement it appeared that the consignor had not been paid for them, the Court of K. B. held that the assignee of the bill of lading could not maintain *trover* against the consignor who stopped the goods *in transitu* upon the insolvency of the consignee. *Salomons* v. *Nissen.* 2 T. R. 674

15. But in a subsequent case the Court of K. B. decided that the property of goods did pass by indorsement and delivery of the bill of lading by the consignee to another *bonâ fide* for a valuable consideration, *and without collusion with the consignee*; although the indorsee knew at the time that the consignor had not received money payment for his goods but had taken the consignee's acceptances payable at a future day not then arrived; and that court held that after such assignment of the bill of lading the consignor *could not stop the goods in transitu upon the insolvency of the original consignee.*

Cuming v. *Brown.* 9 E. R. 506

16. If a factor, in consideration of goods being consigned to him, accept bills drawn by the consignor, and pay part of the freight, and become insolvent before the bills are due, and before the goods get into his *actual* possession, the consignor may stop them *in transitu*. *Kinloch* v. *Craig*, 3 T. R. 119. 783—(affirmed in *Dom. Proc. May* 14, 1790.)

17. *A.* of *Liverpool* wishing to draw upon the banking-house of *B.* in *London* to a large amount, agreed among other securities given, to consign goods to a mercantile house in *London*, consisting of the same partners as the banking house, though under the firm of *B.* and *C.*; accordingly he remitted the invoice of a cargo and the bill of lading indorsed in blank to *B.* and *C.*, but the cargo was prevented from leaving *Liverpool* by an embargo; *A.* then became bankrupt being considerably indebted to *B.*, and the cargo was remitted to *A.*'s assignees by the captain; held, that *B.* and *C.* might maintain trover for it against the captain.

Hailte v. *Smith & al.* in *Cam. Scac.* 1 B. & P. 563

18. Where goods were consigned to *A.*, and on his becoming a bankrupt his assignee went to the inn where they were arrived, and put his mark on them, but did not take them away, because they had been attached there by a creditor of the bankrupt; the consignor could not afterwards stop them because they were not then *in transitu*. *Ellis* v. *Hunt*; *and* v. *Dawes*. 3 T. R. 464

19. It is not necessary in order to divest the consignor's right to stop *in transitu* that the goods should have been taken by the hands of the consignee himself. 3 T. R. 464

20. *A.* agreed to buy some articles of plate of *B.* who was to get *A*'s arms engraven on them, and to pay for the engraving; held, that a delivery to the engraver for that purpose was not a delivery to *A.* so as to defeat *B.*'s right of stopping the goods *in transitu*, the price of the goods not being paid by *A.* *Owenson* v. *Morse*. 7 T. R. 64

21. A consignor's right in stopping goods *in transitu*, is not taken away by the consignee's having partly paid for the goods. *Hodgson & al.* v. *Loy*. 7 T. R. 440

22. *A.* at a foreign port, ships goods by the order and on the account of *B.*, to be paid for at a future day; and bills of lading are accordingly signed by the master of the ship. One of the bills is immediately transmitted to *B.*, who, before the arrival of the ship at the place of destination, sells the goods, and indorses the bill of lading to *C.* After the arrival of the ship, and *a delivery of part of the goods* to the agent of *C.*, *B.* becomes bankrupt, without having paid *A.* the price of the goods. By this delivery the *transitus* is *at an end* as to the *whole of the goods*.

Slubey v. *Heyward*. 2 H. B. 504

23. A number of bales of bacon, then lying at a wharf, having been sold for an entire sum, to be paid for by a bill at two months, an order was given to the wharfinger to deliver them to the vendor; who went to the wharf, weighed the whole, and took away several bales, and then became bankrupt; whereupon the vendor, within *ten* days from the time of the sale, ordered the wharfinger not to deliver the remainder: held that the vendee had taken possession of the whole; and that the vendor had no right to stop what remained in the hands of the wharfinger; though by the custom of the trade the charges of warehousing were to be paid by the vendor for *fourteen* days after the sale.

Hammond & al. v. *Anderson*. N.R. 69

24. A trader here gives an order to his correspondent abroad to ship him certain goods, which the latter procures upon his own credit, without naming the trader here, and ships to him at the original price, charging only his commission; held that the correspondent abroad is so far a *vendor* as between him and the trader here, that on the bankruptcy of the latter he may stop the goods *in transitu* by procuring the bill of lading from the bankrupt's brother; and this, though the trader here had before his bankruptcy accepted bills drawn on him by his correspondent for the amount of the goods; such acceptances proveable under his commission, amounting at most to part payment for the goods, which does not take away the vendor's right to stop *in transitu*.

Feise & al. v. *Wray*. 3 E. R. 93

25. Whether a delivery by the consignor of goods on board a ship chartered by the consignee be or be not a delivery to him, so that the consignor cannot afterwards stop them *in transitu*; certainly where the delivery was made on board such a ship in Russia, and by a law of that country, the owner of goods, in case of the bankruptcy of the vendee, may sue out process to retake his goods on board a ship, &c. and retain them till payment; and the owners hearing of the insolvency of the vendee, applied to the captain on board

of whose ship the goods had been delivered, to sign the bills of lading to their order, which he complied with, without the necessity of suing out process: held that this was a substantial compliance with such law, and that the captain, on his arrival here, was bound to deliver the goods to the order of the vendors, and not to the assignees of the vendee, who had become bankrupt.

Inglis & al. v. *Usherwood.* 1 E. R. 515

26. A trader in *England* charters a ship on certain conditions for a voyage to *Russia*, and to bring goods home from his correspondent there, who accordingly ships the goods on account and at the risk of the freighter, and sends him the invoices and bills of lading of the cargo: held that the delivery of the goods on board such *chartered* ship does not preclude the right of the consignor to stop the goods while *in transitu* on board the same to the vendee, in case of his insolvency in the meantime before actual delivery, any more than if they had been delivered on board a *general* ship for the same purpose. And a demand of the goods having been made by the agent of the consignor upon the captain before they were unloaded, after which he delivered them to the assignees of the vendee; held that the consignor might maintain trover against the assignees.

Bohtlingk v. *Inglis & al.* 3 E. R. 381

27. Where *A.* and *B.*, traders, living in *London*, were in the course of ordering goods of the defendants, cotton manufacturers at *Manchester*, to be sent to *M.* and Co. at *Hull*, for the purpose of being afterwards sent to the correspondents of *A.* and *B.* at *Hamburgh;* and on the 31st of *March A.* and *B.* sent orders to the defendants for certain goods *to be sent* to *M.* and Co. at *Hull, to be shipped for Hamburgh as usual:* held that as between buyer and seller the right of the defendants to stop all *in transitu* was at an end when the goods came to the possession of *M.* and Co. at *Hull;* for they were for this purpose the appointed agents of the vendees, and received orders from them as to the ulterior destination of the goods; and the goods after their arrival at *Hull, were to receive a new direction from the vendees.*

5 E. R. 175

(See BANKRUPT VIII. 8. 9.

28. *A.* the general agent in *London* of *B.* and Co. a house at *Paris*, with power to export for them to such markets as he should think fit, purchased goods in the name of *B.* and Co. of *C.* at *Manchester*, and directed them to be sent to *D.* a packer in *London.* After their arrival, *A.* had some of the goods unpacked and sent away, and the remainder repacked. News then arrived of the failure of *B.* and Co.: held that the goods in *D.*'s hands were no longer *in transitu*, and that *C.* had no right to stop them.

Leeds v. *Wright.* 3 B. & P. 320

29. Where a trader has no warehouse of his own, but uses that of his packer for receiving goods consigned to him, the *transitus* of such goods is at an end, upon the delivery of them to the packer. *Scott* v. *Pettit.* 3 B. & P. 469

30. *A.* living at *N.* in *Devonshire*, ordered goods of *B.* in *London*, who sent them by ship *via Exeter*, consigned to *A.*, and advised him thereof; on their arrival at *Exeter* they were delivered to *C.* a wharfinger, who received them on *A*'s account and paid the freight and charges; after their arrival *A.* wrote to *B.* informing him that in consequence of his affairs being deranged he should not take the goods, and telling him that they were at *Exeter;* at this time *A.* had committed an act of bankruptcy, upon which he was afterwards declared a bankrupt; *B.* applies to *C.* for the goods, and tendered him the freight and charges due, upon which *C.* promised not to deliver them out of his custody, but afterwards did deliver them to the assignees of *A.*, though indemnified by *B.:* held, 1st, that *B.* had a right to stop the goods in the hands of *C*; and secondly, that he might maintain trover for them against *C. Mills* v. *Ball.* 2 B. & P. 457

31. *A.* of *Newcastle* shipped goods for *London* to order of *B.;* before their arrival *B.* wrote to say that he was in failing circumstances, and would not apply for the goods on their arrival. To this *A.* returned a general answer without making any mention of the goods, but immediately left *Newcastle* for *London*, and on his arrival applied at the wharf of *C.*, where the goods had in the mean time arrived (and where goods shipped for *B.* usually were landed and kept till sent for by him) tendering the freight and charges paid for the goods, and requiring a

delivery of them, which was refused, unless upon payment of a general balance due from *B.* to *C.* for wharfage. Held that the contract as between *A.* and *B.* having been rescinded previous to the arrival of the goods, *C.* had no right to retain against *A.* for a general balance due to him from *B.*

Richardson v. *Goss.* 3 B. & P. 119

32. *Semble,* that the goods were no longer *in transitu* when arrived at the wharf of *C.* where the goods of *A.* were usually landed and kept. *ib.*

33. An usage for carriers to retain goods as a lien for a general balance of account between them and the consignees cannot affect the right of the consignor to stop the goods *in transitu.*

Oppenheim v. *Russell.* 3 B. & P. 42

34. *Semb.* that such a lien could not be established even by agreement between the carrier and the consignor. *ib.*

35. One who has a lien on goods in his possession, if he afterwards deliver them to a ship carrier to be conveyed on account and at the risk of his principal, though unknown to the carrier, cannot recover his lien by stopping the goods *in transitu,* and procuring them to be re-delivered to him by virtue of a bill of lading signed by the carrier in the course of his voyage.

Sweet v. *Pym.* 1 E. R. 4

BILL OF SALE.

1. It is a general rule in the transfer of chattels, that the possession must *accompany and follow the deed.*

Edward v. *Harben.* 2 T. R. 587

2. Therefore where the conveyance is *absolute,* the possession must be delivered immediately; where it is *conditional,* it will not be rendered void by the vendor's continuing in possession till the condition be performed.

2 T. R. 587

3. An *absolute* conveyance of personalty, without possession, is, *in point of law,* fraudulent; and not merely *evidence of fraud.* 2 T. R. 587 (See tit. EXECUTOR.)

4. The goods of *A.* being taken in execution and put up to sale, *B.*, a relation of *A.*, became the purchaser, and took a bill of sale of the sheriff, but permitted *A.* to continue in possession; *A.* then executed another bill of sale of the same goods to *C.* a creditor, under which the latter took possession and sold them; whereupon *B.* brought an action against *C.* for the produce: held that the first bill of sale was valid, and that *B.* was therefore entitled to recover.

Kidd v. *Rawlinson.* 2 B. & P. 59

BOND.

I. *Limitation of action on.*

1. The circumstance of 20 years having elapsed without any demand made, is of itself a presumption that a bond has been satisfied.

Oswald v. *Leigh.* 1 T. R. 270

2. Satisfaction of a bond may be presumed within a less period, if any evidence be given in aid of the presumption; as if an account between the parties has been settled in the intermediate time, without any notice having been taken of such a demand.

1 T. R. 270

3. But in either case it is only a ground on which the jury may presume satisfaction, and is in itself no legal bar.

1 T. R. 270

II. *Of Indemnity, Suretyship, and other joint Bonds, and of Contribution thereon.*

1. A bond with a condition that a clerk shall faithfully serve and account for all money, &c. to the obligee and his executors, does not make the obligor liable for money received by the clerk in the service of the executors of the obligee, who continue the business and retain the clerk in the same employment, with the addition of other business, and an increase of salary. *Barber* v. *Parker.* 1 T. R. 287

2. But a bond for the fidelity of a clerk, who was taken into the service of the obligees *ae a clerk in their shop and counting-house,* is not discharged by the obligees taking another partner into their house; and the obligees may recover money received by the clerk after such change of partners.

Barclay v. *Lucas. K. B. M.* 24 *G.* 3. 1 T. R. 291, *n.*

3. Such a bond is only as a security to the *house* of the obligees. 1 T.R.287

4. Where a bond by *A.* reciting that *B.* intended to open a banking account with *C.*, *D.*, and *E.*, as his bankers, was conditioned for payment to *them* of all sums from time to time advanced to *B. at the banking-house of C., D.,* and *E.*: held that on *C.*'s death such obligation ceased, and did not cover

future advances made after another partner was taken in; and that *B.*, who was indebted to the house at *C.*'s death, having afterwards paid off the balance, which was applied at the time to the old debt incurred in *C.*'s life-time, *A.* was wholly discharged from his obligation. *Strange* v. *Lee.* 3 E. R. 484

5. A bond was given to *A.*, *B.*, *C.*, &c. payable to them and their successors, as the governors of the society of musicians, conditioned to secure *J. H.*'s faithfully accounting with them and their successors, governors, &c. as their collector; afterwards the society was incorporated by letters patent, at which time *J. H.* had duly accounted for all monies collected by him; but after the incorporation he received money for which he did not account; held that the obligor of the bond was not liable for such default.

Dance v. *Gridler.* N. R. 34

13. A bond given to *Trustees* to secure the faithful services of a clerk to the *Globe Insurance Company* who were no corporation, may be put in suit by the trustees for a breach of faithful service committed by the clerk at any time during his continuance in the service of the actual existing body of persons carrying on the same business under the same name, notwithstanding any intermediate change of the original holders of the shares by death or transfer: the intention of the parties to the instrument being apparent to contract for such service to be performed to the company as a fluctuating body: and the intervention of the *trustees* removing all legal and technical difficulties to such a contract made with, or suit instituted by, the company themselves as a natural body.

Metcalfe, Bart. & al. v. *Bruin.* 12 E. R. 400

7. If *A.* subscribe a guaranty to *B.* for the honesty of *C.* who embezzles money, *B.* may maintain an action on the guaranty, though three years have elapsed without notice having been given of the embezzlement by *B.* to *A.* if *A.* was acquainted with the circumstances from any other quarter, and *B.* did not conceal it from him industriously. And in such case *B.* will not be discharged from the guaranty, though *B.* appear to have given credit to *C.* for the amount of the sum embezzled.

Peel & al. v. *Tatlock.* 1 B. & P. 4 9

8. Under a bond of indemnity given by *A.* that *B.* who was appointed the general agent of *C.* the receiver of his rents, and the manager of his estates, should pay over to *C.* all rents which he should receive, *as also the increase and improvements thereof upon any new contracts or renewals of leases*; *A.* is answerable for all *fines* received by *B.*, on renewing the leases, which were not paid over by him.

Irish Society v. *Needham.* 1 T.R. 482

9. If the obligee in a joint and several bond make one of two obligors his executor, with others, the action on the bond is discharged as to both obligors.

Cheetham & al. v. *Ward.* 1 B. & P. 630

10. But where *A.* as surety, and *B.* as principal, are jointly and severally bound to *C.*, *B.* becomes insolvent, and *C.* the obligee, receives a dividend from his effects, and covenants not to sue *A.*, and that if he do, the deed of covenant may be pleaded in bar, *C.* may nevertheless sue *A.*, for this is only a release to *B.* by construction.

Dean v. *Newhall.* 8 T. R. 168

11. Bail who are indemnified, being sued upon the bail-bond, file a bill in equity for an injunction, suggesting want of consideration for the original debt; and an injunction is granted *pro tempore* on condition of paying the debt into court; which is done accordingly; and afterwards the money is paid over: held that the bail were damnified by payment of money into court, after notice to the debtor, and no fund provided by him. For one who agrees to indemnify and *save* others *harmless* against a certain engagement, is bound to secure them from incurring any expense, as it runs on at the time, which falls upon them by virtue of that engagement.

Sparke v. *Martindale.* 8 E. R. 593

12. It seems that one of several co-sureties in a bond may recover against any one of the others his aliquot proportion of the money paid by him under the bond, regard being had to the number of sureties.

Cowell v. *Edwards.* 2 B. & P. 268

13. Even though the insolvency of the principal and of the other sureties be not proved. *ib.*

14. If *A.*, *B.*, and *C.* become bound as sureties for *B.* in three separate bonds, and any one of them be compelled to pay the whole debt of the principal,

the two others are compellable to contribute in proportion to the penalties of their respective bonds.

Deering v. *Winchelsea* (E. of) in the Exchequer, 1787. 2B. & P.270

III. *Penalty and Damages.*

1. In an action on a bond damages may be recovered for more than the penalty.
Lonsdale (E. of) v. *Church*. 2T.R.388
2. Therefore in debt on bond with condition to account for money to be received, the court will not stay proceedings upon paying the penalty into court. 2 T. R. 388
3. But in a subsequent case the court ordered satisfaction to be entered on the record in an action on a bond of indemnity, on the defendant's paying the penalty of the bond and the costs of the action.
Wild v. *Clarkson*. 6 T. R. 303
4. In an action upon a *judgment recovered upon a bond*, interest may be given in damages beyond the penalty of the bond; though it were a judgment recovered abroad, viz. in *Ireland*.
M'Clure v. *Dunkin*. 1 E. R, 436
5. If an instalment of an annuity secured by bond be not paid on the day, the bond is forfeited, and the penalty is the debt in law.
Judd v. *Evans*. 6 T. R. 399
6. And therefore the defendant having been charged in execution for such a penalty previous to the last insolvent act, the court refused to order that sum to be reduced in the Marshal's book to the sum actually due for the arrears of the annuity, in order that he might take the benefit of that act.
6 T. R. 399
7. The stat. 8 & 9 *W.* 3 *c.* 11. § 8. which enacts, "that in actions on any penal sum for non-performance of covenants, &c. the plaintiff *may* assign as many breaches, &c.; and if judgment shall be given for the plaintiff on *nihil dicit*, the plaintiff *may* suggest on the roll as many breaches, &c, as he shall think fiit, upon which shall issue a writ to summon a jury, before the justices of assize, &c. to inquire, &c. and to assess the damages, &c." is compulsory on the plaintiff, and he cannot enter up judgment for the whole penalty on a judgmem by default, as he might have done at common law.
Roles v. *Rosewell*. 5 T. R. 538;—and *Hardy* v. *Bern*. 5 T. R. 540
8. After judgment for the plaintiff on demurrer, in debt on bond conditioned to pay an annuity, the defendant cannot take out execution for the arrears due, but must assign breaches on the record under stat. 8 & 9 *W.* 3.
Walcot v. *Goulding*. 8 T. R. 126
9. After oyer of the condition and *non est factum* pleaded to debt on bond, on which issue is joined and notice of trial given, the plaintiff may enter a suggestion on the roll, and assign breaches, pursuant to the 8 & 9 *W.* 3.
Ethersey v. *Jackson*. 8 T. R. 255
10. A bond given to the Lord Chancellor by the petitioning creditor of a bankrupt, under 5 *G.* 2. *c.* 30. § 23. is not within the 8 & 9 *W.* 3. because the Chancellor is to assess the damages; though he may assist his conscience by directing an inquiry before a Master, or an issue at law.
Smithey v. *Edmondson*. 3 E. R. 22
11. On a bond conditioned for replacing stock, the obligee is not entitled to special damages for a profit which he might have made, if it had been sooner replaced, unless he shows that he actually would have made it. The measure of damages on such a bond is the price, at the day when it ought to have been replaced, or the price at the day of trial, at the option of the plaintiff.
M'Arthur v. *Seaforth, Ld.* 2W.P.T.257

IV. *Condition.*

1. A bond conditioned for the payment of a sum of money to such person as *A.* shall by will appoint, does not become absolute by the non-payment to the *residuary legatee* of *A.*, no specific appointment having been made in the will of *A.*
Buckland v. *Barton*. 2 H. B. 136
2. A bond in a penal sum, conditioned for payment of a less sum generally, without naming any day of payment, is payable on the day of the date; and if an action be brought upon it, the court will refer it to the Master to compute principal, interest, and costs, and on payment of the same stay the proceedings, under stat. 4 *An.* *c.* 16. § 13. *Furquhar, Bart.* v. *Morrice*. 7 T. R. 124
3. Interest is due on such a bond though not expressly reserved. 7 T.R.124
4. A bond was conditioned that the obligor should indemnify the obligee from all sums the latter should pay or be liable to pay on the obligor's account;

and, before the execution of the bond, a memorandum was thereon indorsed that the obligee "*hath* given an undertaking not to sue upon the bond till after the obligor's death:" held that this memorandum was to be taken as part of the condition; and made the bond in effect payable only by the representatives of the obligor after his death.

Burgh & al. v. *Preston.* 8 T. R. 483

5. If the condition of a bond be to pay a certain sum, or to render a person in execution who has once been discharged, the latter condition is void; but on non-payment of the money the bond is forfeited.

Da Costa v. *Davis.* 1 B. & P. 242

V. *Consideration.*

1. Where a woman, *on her marriage* with a copyholder of a manor, where the widows of husbands dying seised are entitled to their free-bench, gave a bond that the son of her intended husband by a former wife should have possession of part of the copyhold estate after the death of the husband *on condition of his repairing* the part of the house reserved for her, &c.: this was held to be a good consideration.

R. v. *Inhabitants of Lopen.* 2T.R. 580

2. A bond given by an incumbent to the patron, on presentation, to reside on the living, or to resign if he did not return to it, after notice, and also not to commit waste, &c. on the parsonage-house, is good.

Bagshaw v. *Bossley.* 4 T. R. 78

3. In such case a licence to the incumbent to absent himself from the living may be revoked. 4 T. R. 78

4. A bond given by a schoolmaster of an ancient public school, who had a freehold in his office, to resign at the request of his patron, is good at law; but equity will restrain any improper use of it by the patron.

Legh v. *Lewis.* 1 E. R. 391

5. On error brought in this case in the Exchequer Chamber, that court thought it did not appear upon the pleadings that it was a freehold office, and therefore affirmed the judgment without giving any opinion upon the principal point. *Lewis* v. *Legh* (in error.) 3 B. & P. 231

6. Held by B. R. that the ordinary of the diocese may not refuse to admit a clerk to a rectory to which he was presented because he had given a general bond to resign upon the request of his patron.

Bishop of London v. *Ffytche.* 1 E.R. 487

7. But this judgment was reversed in *Dom. Proc.* *ib.*

8. In consideration that *A.* would take *B.* as an assistant in his business as a surgeon, for so long time as it should please *A.*, *B.* agreed not to practise on his own account for 14 years within ten miles of the place where *A.* lived, and gave a bond for this purpose; this bond was held good in law.

Davis v. *Mason.* 5 T. R. 118

(And see AGREEMENTS II. 15.)

9. A bond given by a servant of the *African* Company conditioned to take possession of the effects of persons dying intestate in one of their settlements on the coast of *Africa*, and sell the same, and remit the produce to the Company in *Europe*, to be by them delivered to the lawful administrator, is a legal bond.

African Company v. *Torrane.* 6T.R. 588

10. A bond given to an individual conditioned to be void if the obligor (on the obligee's agreeing not to prosecute him) should remove certain public nuisances and not erect any others of the same kind, is good in law.

Fallowes v. *Taylor.* 7 T. R. 475

11. A bond taken by commissioners appointed under an inclosure act, to indemnify themselves against the expences of a suit brought to try the right to an allotment made by them and in which they are, according to the directions of the act, made defendants, is not void; though there be a fund provided out of which such expenses may in some cases be satisfied; at least if the commissioners doubt whether the case in question be one of those cases. *Iles* v. *Boxall.* 2 B. & P. 89

BRIDGES.

1. Those who are bound to repair a carriage bridge, are bound to widen it, if the exigences of the public require it.

R. v. *Cumberland C. Inhab.* 6. T. R. 194

2. On error brought in this case in the House of Lords, the Lord Chancellor intimated doubts upon the point; but the judgment was affirmed on the ground that after verdict it must be presumed the over narrowness of the bridge arose from its having been contracted from its ancient width.

Cumberland C. Inhab. v. *R.* (in error.) 3 B. & P. 354

3. By the common law, declared and defined by the stat. 22 *H.* 8. *c.* 5. and subsequent acts, where the inhabitants of a county are liable to the repair of a public bridge, they are liable also to repair to the extent of 300 feet of the highway at each end of the bridge; and if indicted for the non-repair thereof, they can only exonerate themselves by pleading specially that some other is bound by prescription or tenure to repair the same. *R.* v. *Inhabitants of York W. R.* 7 E. R. 588

4. The inhabitants of a county are bound to repair every *public* bridge within it; unless, when indicted for the non-repair of it, they can shew by their plea that some other person is liable; and every bridge *in a highway* is by the stat. 22 *H.* 8. *c.* 5. deemed a *public* bridge for this purpose. Therefore where Queen Anne, in 1708, for her greater convenience, built a bridge on the Thames at Datchet, in the common highway leading from London to Windsor, in lieu of an ancient ferry which belonged to the Crown, and she and her successors maintained and repaired the bridge till 1756, when being in part broken down, the whole was removed, and the materials converted to the use of the King, by whom the ferry was re-established as before: the Court of K. B. held that the inhabitants of the county of Bucks, who, in answer to an indictment for the non repair of that part of the bridge lying in the county of Bucks, pleaded these matters, and shewed that the bridge was a common public bridge, were nevertheless bound to rebuild and repair it.
R. v. *Inhabitants of Buckinghamshire.* 12 E. R. 192

5. The county or riding is liable to the repair of a bridge built by trustees under a turnpike act; there being no special provision for exonerating them from the common law liability, or transferring it to others; though the trustees were enabled to raise tolls for the support of the roads.
R. v. *The Inhabitants of the West Riding of Yorkshire.* 2 E. R. 342

6. If a bridge be of public utility, and used by the public, the public must repair it, though built by an individual: *aliter* if built by him for his own benefit, and so continued, without public utility, though used by the public. *ib.*

7. A bridge built in a public way without public utility is indictable as a nuisance; and so it is if built colourably in an imperfect or inconvenient manner, with a view to throw the *onus* of rebuilding or repairing it immediately on the county. *ib.*

8. Where to an indictment against a Riding for not repairing a public carriage bridge, the plea alledged that certain townships had *immemorially* used to repair the said bridge, evidence that the townships had enlarged the bridge to a carriage bridge, which they had before been bound to repair as a foot bridge, will not support the plea.
M. 28 *G.* 3. 2 E. R. 356, *n.*

9. Where townships have so enlarged a bridge which they were before bound to repair as a foot bridge, they shall still be liable *pro ratâ.* *ib.*

10. Where an individual builds a bridge which he dedicates to the public, by whom it is used, the county are bound to repair it *ib.*

11. The county is liable to repair a bridge built in the highway and used by the public above forty years, though originally erected for the convenience of an individual. *R.* v. *Glamorgan C. Inhab.; cor. Ld. Kenyon C. J. at Hereford in.* 1788. 2 E. R. 356, *n.*

12. *A.* grants liberty, licence, power, and authority to *B.* and his heirs to build a bridge on his land, and *B.* covenants to build the bridge for public use, and to repair it and not to demand toll: the property in the materials of the bridge when built and dedicated to the public still continues in *B.*, subject to the right of passage by the public; and when severed and taken away by a wrong doer, he may maintain trespass for the asporation.
Harrison v. *Parker.* 6 E. R. 154

13. An action will not lie by an individual against the inhabitants of a county for an injury sustained from a county bridge being out of repair.
Russel v. *Men of Devon.* 2 T. R. 667

BROKER.

14. Goods sold by a broker for a principal not named, upon the terms, as specified in the usual *bought* and *sold* notes (delivered over to the respective parties by the broker), of "*payment in one month, money,*" may be paid for by the buyer to the broker *within the month*, and that *by a bill*

of exchange accepted by the buyer and discounted by him within the month, though having to run a longer time before it was due. But where the buyer was also indebted to the same broker for another parcel of goods, the property of a different person, and he made a payment to the broker, *generally*, which was larger than the amount of either demand, but less than the two together; and afterwards the broker stopped payment; such payment to the broker ought to be equitably apportioned as between the several owners of the goods sold, who are only respectively entitled to recover the difference from the buyer. *Favenc* v. *Bennett.* 11 E. R. 36

C.

CARRIER.

1. Where a carrier gives notice by printed proposals, that he will not be answerable for certain valuable goods, if lost, "*of more than the value of a sum specified*, unless entered and paid for as such;" and valuable goods of that description are delivered to him by *A* who knows the conditions, but concealing the value pays no more than the ordinary price of carriage and booking; on a loss happening, the carrier is *neither liable* to the *extent of the sum specified*, nor *to repay the sum paid for carriage and booking*.

Clay v. *Willan & al.* 1 H. B. 298
S. P. *Izett* v. *Mountain.* 4 E. R. 371

2. Carriers are answerable for the loss of goods while in their custody *as common carriers*, in all cases, unless the loss happen by the act of God, or of the king's enemies.

Hyde v. *Trent Comp.* 5 T. R. 389

3. A carrier is in the nature of an insurer. 1 T. R. 33

4. A carrier who undertakes for hire to carry goods is bound to deliver them at all events, except damaged or destroyed by the act of God or the king's enemies; even though the jury expressly find that the goods were destroyed *without any actual negligence in the carrier.*

Forward v. *Pittard.* 1 T. R. 27

5. A carrier is liable for inevitable accident, happening through the intervention of any human means, as by fire which began at another booth in a fair than that wherein the goods were placed, and afterwards spread thither. 1 T. R. 27

6. A common carrier between *A.* and *B* (employed to carry goods from *A.* to *B.* to be forwarded to *C.*) carried them to *B.*, then put them in his warehouse, in which they were destroyed by an accidental fire, before he had an opportunity of forwarding them; and held not answerable for the loss. *Garside* v. *The Proprietors of the Trent Navigation.* 4 T. R. 581

7. Common carriers from *A.* to *B.* charge and receive for cartage of goods to the consignee's house at *B.* from a warehouse there, where they usually unload, but which does not belong to them; they must answer for the goods if destroyed in the warehouse by an accidental fire, though they allow all the profits of the carriage to another person, and that circumstance be known to the consignee. *Hyde* v. *The Trent, &c. Company.* 5 T. R. 389

8. Whether the carriers would be liable in the above case, if they do not charge for cartage and wharfage? *Qu.* 5 T. R. 389

9. The owners of vessels on the navigation between *A.* and *C.* having given public notice that they would not be answerable for losses in any case, except the loss were occasioned by the want of care in the master, nor even in such case beyond 10*l. per cent.*, unless extra freight were paid; the master of one of the ships took on board the plaintiff's goods to be carried from *A.* to *B.* (an intermediate place between *A.* and *C.*) and to be delivered at *B.*: the vessel passed by *B.*, without delivering the plaintiff's goods there, and sunk before her arrival at *C.*, without any want of care in the master: held that the owner of the vessel was responsible for the whole loss in an action on the contract.

Ellis v. *Turner & al.* 8 T. R. 531

10. The defendant, a common carrier, from *R.* to *B.* through *W.*, employs distinct boats to carry from *R.* to *B.*, and from *W.* to *B.*, which pass on different days; the plaintiff knowing this, and having corn at *W.*, which is threatened to be seized by a mob, and fearing to wait till the defendant's boat would in the usual course of employment, go from *W.* to *B.*, stops the

boat passing from *R.* to *B.*, and, *without disclosing the circumstances to the boatman*, prevails on him to take the corn on board, and then dispatches him forward in the night; the corn being seized by the mob, and an action brought for the loss; after a verdict for the defendant, negativing that the corn was delivered in the usual course of dealing as a common carrier: held that the verdict might be sustained, either on the ground of fraud in the plaintiff; or on that of a tacit stipulation on the part of defendant to do the best he could, but not to be answerable as a common carrier for the violence of the mob; or on the ground that the boatmen had not authority to accept the goods at *W.*; much less to accept them in that manner.

Edwards v. *Sherratt.* 1 E. R. 604

11. A carrier by water contracting to carry goods for hire *implicitly* promises that the vessel shall be tight and fit for the purpose, and is answerable for damage arising from leakage: and this though he had given notice "that he would not be answerable for *any* damage *unless* occasioned by want of ordinary care in the master or crew of the vessel, in which case he would pay 10 *per cent.* upon such damage, so as the whole did not exceed the value of the vessel and freight:" for a loss happening by the *personal* default of the carrier himself (such as the not providing a sufficient vessel), is not within the scope of such notice, which was meant to exempt the carrier from losses by accident or chance, &c.; even if it were competent to a common carrier to exempt himself by a special acceptance from the responsibility cast upon him by the common law.

Lyon v. *Mells.* 5 E. R. 428

12. Where one delivered goods of *above 5l. value* to common carriers to carry by the mail, *paying no extra price;* and by a public notice which had before reached the owner the carriers had declared they would not be accountable for any package *above* the value of *5l.*, *unless* insured and paid for accordingly: held, that the goods having been sent by a different carriage and lost, the owner could not recover the value against the carriers: for the loss happened by no tortious conversion, nor by a renunciation of their character as common carriers, but only by a negligent discharge of their duty as such: also, that he could not recover even the *5l.* *Nicholson* v. *Willan.* 5 E. R. 507

13. If *A.* send goods by *B.*, who says, "I will warrant they shall go safe;" he is liable for any damage sustained by them, notwithstanding *A.* send one of his own servants in *B.*'s cart to look after them.

Robinson v. *Dunmore.* 2 B. & P. 416

14. In an action by the consignor of goods against a carrier for non-delivery, where the plaintiff averred that the defendant undertook to deliver, *&c.* in consideration of the hire to be paid *by the plaintiff;* proof that the hire was to be paid by the *consignee* was held to be no variance, the consignor being by law liable.

Moor v. *Wilson.* 1 T. R. 659

15. But where the consignor of goods had delivered them to a particular carrier by order of the consignee, and they were afterwards lost; it was held that the consignor could not maintain an action against the carrier for the loss, although he paid for booking the goods; and that the action could only be brought by the consignee.

Dawes v. *Peck.* 8 T. R. 330

16. Delivery of goods by the vendor on behalf of the vendee, to a carrier not named by the vendee, is a delivery to the vendee.

Dutton v. *Solomonson.* 3 B. & P. 582

17. The owner of a ship who takes goods for hire is not liable beyond the value of the ship and freight under 7 *G.* 2. *c.* 15. § 1, in the case of a robbery, in which one of the mariners is concerned, by giving intelligence, and afterwards sharing the spoil.

Sutton v. *Mitchell.* 1 T. R. 18. 75, (And see stat. 26 *G.* 3. *c.* 86.)

18. A count in an action on the case stating that the defendants being owners of a ship at *L.* bound on a voyage from thence to *W.* the plaintiff *shipped goods on board to be carried upon the said voyage by the defendants and to be delivered at W.* to the plaintiff's assigns and thereupon the plaintiff insured the goods at and from *L.* to *W.*: and then averring that it was *the duty* of the defendants as such owners to cause the ship to proceed on the voyage from *L.* to *W. without deviation:* and alledging a breach of such duty by their causing the ship to deviate from the course of that voyage; after which she was lost with the goods; and the plaintiff by reason of such deviation

lost his goods and the benefit of his policy, &c.; cannot be maintained, for want of alledging that *the goods were delivered to, or received by the defendants for the purpose of carriage* or that *they had notice of the shipment*, from whence a promise or duty founded upon an agreement to carry the goods might be inferred; and also for want of an allegation that the defendants *undertook to carry the goods directly to W. from L.*: for though the ship's ultimate destination might be *W.* yet she might have been first destined to other places.

Max v. *Roberts & al.* 12 E. R. 89

CERTIFICATE OF JUSTICES OF THE PEACE.

1. A certificate by the justices of the peace that a highway (indicted) is in repair, is a legal instrument, recognized by the courts of law, and admissible in evidence after conviction when the court are about to impose a fine.
R v. *Mawbey*, Bart. 6 T. R. 619
2. And consequently it is illegal to conspire, to pervert the course of justice, by producing a false certificate in evidence to influence the judgment of the court. 6 T. R. 619
3. The origin of these certificates not now to be traced. 6 T. R. 635
4. Certificates of bishops with respect to marriage are received in evidence. 6 T. R. 637
5. So were formerly certificates from the captain of *Calais*. 6 T. R. 637
6. So are the certificates of the Judges in *Wales*, respecting the practice of their courts. 6 T. R. 638

CERTIORARI.

I. *In what Cases grantable.*

1. A *certiorari* lies to remove a conviction on stat. 16 *G.* 3. *c.* 30. (to prevent the stealing of deer) if the defendant has not appealed to the Quarter Sessions. 2 T. R. 89
2. *Qu.* Whether the court will grant a *certiorari* to remove an order of sessions by which a soldier is continued in custody on a charge of being the father of a bastard child, under stat. 6 *G.* 2. *c.* 31. *R.* v. *Bowen.* 5 T. R. 156
3. An indictment found at the Quarter Sessions on stat. 1 *W. & M. c.* 18. for disturbing a dissenting congregation, may be removed into this court by *certiorari* before verdict.
R. v. *Hube.* 5 T. R. 542
4. No *certiorari* lies to remove an indictment on stat. 30 *G.* 2. *c.* 24. § 1. for obtaining money by false pretences.
R. v. *Young.* 2 T. R. 472
(And see *R.* v. *Smith*, *Cowp.* 24)
5. If a statute, creating an offence, give cognizance of it to one justice, with an appeal to the Sessions, and take away the *certiorari*, as to all the proceedings and afterwards further powers for the punishment of the offender are given to the Sessions, by another statute, which does not take away the *certiorari*; the clause for taking away the *certiorari* in the former act cannot be extended to the proceedings under the latter.
R. v. *M. Terrett.* 2 T. R. 735
6. Therefore where there have been proceedings under both statutes, those under the former act cannot be removed, but those under the latter may. 2 T. R. 735
7. A *certiorari* can only be taken away by express words; and where a statute authorising a summary conviction before a magistrate gives an appeal to the Sessions, who are directed to hear and *finally determine* the matter; this does not take away the *certiorari* even after such an appeal made and determined. *R.* v. *Jukes & al.* 8 T. R. 542
8. The Court of *B. R.* will not grant a *certiorari* to remove the record and proceedings out of a court leet, in order to inquire into the propriety of an amerciament, where the fine has been estreated into the Duchy-Chamber of *Lancaster*, and paid.
R. v. *Heaton.* 2 T. R. 184
9. The court will not grant a *certiorari* to remove the assessments of the land-tax. But if an information be moved for against the commissioners of the land-tax, the court will admit an attested copy of the assessment as evidence, instead of the original.
R. v. *King & al.* 2 T. R. 234
10. Neither will a *certiorari* be granted to remove a poor-rate, on account of the public inconvenience. 2 T. R. 235
11. The court will grant a *certiorari* to remove an indictment for a misdemeanor from the Great Sessions in *Wales* into this court.
R. v. *Griffith.* 3 T. R. 658
12. It is discretionary in the court to grant or refuse a *certiorari* to remove a conviction before justices of the peace: and if the court see that the justices have drawn the proper conclu-

sion from presumptive evidence, they will not grant a *certiorari*.
R. v. *Bass.* 5 T. R. 251

13. The Court of K. B. will not quash a writ of *certiorari*, because the damages laid in the record below, which was an action of assault against excise-officers, were under 40*s.*; there being reason to believe that they could not have an impartial trial below. 4 T. R. 499

14. The court quashed a *certiorari*, which was issued before, but not served until after, a judgment on an indictment for a misdemeanor.
R. v. *The Inhab. of Seton.* 7 T. R. 373

15. After judgment the record can only be removed by a writ of error.
7 T. R. 373

II. *On whose Application, and in what Manner.*

1. A *certiorari* is granted *of course* on the application of the Crown.
R. v. *Eaton.* 2 T. R. 89

2. *Secus*, on the application of a defendant; he must lay some ground for it before the court. 2 T. R. 89

3. The general words of the stat. 25 *G.* 2. *c.* 36. § 10. that no indictment for keeping a disorderly house shall be removed by *certiorari*, do not restrain *the Crown* from removing the indictment, by *certiorari*; there being nothing in the act to shew that the legislature intended that the Crown should be bound by it.
R. v. *R. Davies.* 5 T. R. 626

4. A *certiorari* to remove an indictment against an excise-officer from the Sessions was granted on the motion of the Attorney-General, without any affidavit. *R.* v. *Stannard.* 4 T. R. 161

5. An indictment for not repairing a county bridge may be removed by *certiorari* at the instance of the prosecutor, notwithstanding the general words of stat. 1 *Ann. c.* 18. § 5. that no such indictment shall be removed by *certiorari*.
R. v. *Inhab. of Co. Cumberl.* 6 T. R. 194
Affirmed on error in *Dom. Proc.*
3 B. & P. 354

6. It is no objection to a *certiorari* to remove a presentment of a road made by a justice of peace under the 24th section of 13 *G.* 3. *c.* 78. that it is prosecuted by another than the justice presenting; if it be by his consent.
The K. v. *Inhab. of Penderryn.* 2 T. R. 260

7. The party prosecuting a *certiorari* to remove a conviction, *&c.* must himself enter into a recognizance, with two other persons, in 50*l.* to prosecute it with effect, *&c.* by 5 *G.* 2. *c.* 19. § 2. *R.* v. *Boughey.* 4 T. R. 281

8. The statute is not complied with by the party and his two sureties entering into a recognizance in 25*l.* each, but it must be in the entire sum of 50*l.*
R. v. *Dunn.* 8 T. R. 217

9. Q. How far this statute 5 *G.* 2. *c.* 19. applies to the removal of convictions under the game act. 5 *An. c.* 14.
8 T. R. 218, *n.*

10. A *certiorari* to remove a conviction must by 13 *G.* 2. *c.* 18. § 5. be applied for within six months after the date of such conviction. 4 T. R. 211: 8 T. R 219

11. The six days' notice required by that statute before any application for a *certiorari* to remove proceedings by justices of the peace must be given before making the motion for a rule to shew cause why such *certiorari* should not be granted.
R. v. *Just. of Glamorgansh.* 5 T. R. 279

12. The provisions of the 13 *G.* 2. *c.* 18. do not apply to indictments at the sessions, but only to proceedings of a lower denomination: therefore a *certiorari* to remove an indictment from the sessions may be sued out, without giving the six days' previous notice. The effect of such writ is to remove all proceedings of the nature described therein which have taken place between the teste and return, although the proceedings originated after the teste. The Magistrates below are bound to obey the writ after production of it, and notice to them in fact of such production, when setting in their judicial capacity: and after that all further proceedings before them on the matter are erroneous.
R. v. *Battams.* 1 E. R. 298

13. The court will not grant a *certiorari* to a defendant after he has appealed to the sessions, pending such appeal.
R. v. *Sparrow H.* 28 *G.* 3.
2 T. R. 196, *n.*

14. If a defendant who has been convicted on an indictment in an inferior jurisdiction remove the record into K. B. by *certiorari* between verdict and judgment, with a view of making objections to the indictment in arrest of judgment, that court will send the record back by *procedendo*, without going into the objections to the indictment.
R. v. *Jackson.* 6 T. R. 145

15. If the defendant wish to take the opinion of this court on the sufficiency of such an indictment, he must remove the record here by writ of error after judgment below. 6 T. R. 145

III. *Costs on.*

1. No costs are due on a *certiorari* removing summary proceedings, unless a recognizance being entered into at the time of removing the proceedings. But it is discretionary in the court whether they will grant a *certiorari;* and in future they will compel the party to enter into a recognizance. This was in the case of a conviction on the lottery act. *R.* v. *Jenkinson* (See *ante,* II. 7.) 1 T. R. 82

2. Under the 3d. § of *stat.* 5 *W. & M. c.* 11. for regulating the removal of indictments from the sessions by *certiorari,* the representatives of the prosecutor are entitled to the costs taxed during his life, though no personal demand was ever made by him.
R. v. *R. Chamberlayne.* 1 T. R. 103

IV. *Returns to.*

1. Upon a *certiorari* to remove a conviction by a justice of peace on the deer act, 16. *G.* 3. *c.* 30. a return that the record is returned to the sessions, and that a copy is annexed to the writ, is sufficient; for justices ought in all cases to return convictions to the sessions, whether an appeal lies or not.
R. v. *Eaton.* 2 T. R. 285

2. Third persons cannot object to the misdirection of a *certiorari* to remove a cause from an inferior court, if the proper officers in whose keeping the record was, wave the objection, and return the record upon such writ.
Daniel v. *Phillips.* 4 T. R. 499

3. The court refused a criminal information against a magistrate for returning to a writ of *certiorari* a conviction of a party in *another and more formal shape* than that in which it was first drawn up, and of which a copy had been delivered to the party convicted by the magistrate's clerk; the conviction returned being warranted by the facts
R. v. *Barker.* 1 E. R. 186

CHICHESTER CHURCH.

1. The election of a canon residentiary is in the dean and canons. *Chichester Bp.* v. *Harwood.* 1 T. R. 650

2. The dean has no casting voice. *ib.*

3. The canons have a right to vote by proxy. *ib.*

CHOSE IN ACTION.

1. An assignment of a *chose* in action need not be by deed.
Howell v. *Mac Ivers.* 4 T. R. 690

2. Comments on assignments of *choses* in action *per Buller,* J. 4 T. R. 340

3. Though a *chose* in action cannot strictly in law be assigned, yet in equity it may: and in the case of a policy of insurance the court will so far take notice of an assignment as to permit an action to be brought in the name of the assignor.
Delaney v. *Stoddart.* 1 T. R. 26
(And see *Winch* v. *Keeley,* tit. BANKRUPT X. 3.)

4. The assignee of a *Scotch* bond may maintain an action of assumpsit in the Court of B. R. against the obligor, in his own name.
Innes v. *Dunlop, Bart.* 8 T. 595

CHURCHWARDENS.

Churchwardens *de facto* may maintain an action against a former churchwarden, for money received by him for the use of the parish; though the validity of the election of their plaintiffs to their office be doubtful, and though they be not the immediate successors of the defendant. *Turner* v, *Baynes.* 2 H.B.559

COMMISSION DEL CREDERE.

Is an absolute engagement, to the principal from an insurance-broker, and makes him liable in the first instance, and at all events; though the principal may resort to the underwriter as a collateral security.
Grove et al. v. *Dubois.* 1 T. R. 112
(See further for the general nature of a commission *del credere.*
Bize v. *Dickason,* 1 T. R 285
George v. *Clagget.* 6 T. R. 359
And the case of *Mackenzie & al.* v. *Scott* in *Dom. Proc.* 19th *Dec.* 1796)

COMMON.

I. *Prescription, &c. for.*

1. Common for cattle levant and couchant cannot be claimed by prescription, as appurtenant to a house without any curtilage or land.
Scholes v. *Hargreave.* 5 T. R. 46

2. Levancy and couchancy means the possession of such land as will keep the cattle claimed to be commoned during the winter. 5 T. R. 46

3. A right of common without stint as annexed to an ancient messuage, without land, cannot exist in law.
Benson v. *Chester.* 8 T. R. 396

4. An ancient deed of feoffment granting the wastes and commons of a manor to feoffees in trust to permit the tenants and inhabitants, &c. to use and enjoy the same as they had formerly done, or been accustomed to do, must be taken to mean such a right of common as may by law exist, a right of common limited by levancy and couchancy. 8 T. R. 396

5. A prescription for common of pasture, for a certain number of sheep, on *A.*, every year, *at all times of the year*, is well laid, though the evidence which proves the right of common, proves also that the tenant of a certain farm has a right to have the sheep folded at night on his farm, after they have fed on the common during the day. *Brook* v. *Wilkt.* 2 H. B. 224

II. *Inclosure and Approvement.*

1. The lord has no right, under the statute of *Merton*, to inclose and approve the wastes of a manor, where the tenants of a manor have a right to dig gravel or take estovers on the wastes. *Duberley* v. *Page.* 2 T. R. 391

2. A custom in a manor, that any person being desirous of inclosing may apply to the court, &c. first obtaining the consent of the lord, does not abridge the lord's common-law right of inclosing without any such application, provided he leave a common sufficient for the tenants. 2 T. R. 392, *n.*

3. Any person who is seised in fee of part of a waste within a manor may approve, leaving a sufficiency of common, though he be not the lord of the manor. *Glover* v. *Lane.* 3 T. R. 445

4. A custom that the owners of ancient messuages, &c. within a manor have had assigned to them by the Moss-Reeve certain portion of the common to be held by them in severalty, for digging turves. &c. called Moss-Dales, and have been inclosed and improved such moss-dales (after clearing them of turves), and held them so inclosed in severalty, discharged from all right of common is good in law. *Clarkon* v. *Woodhouse.* 5 T. R. 412, *n.*

5. The lord of a manor, or his grantee, may inclose and improve part of a common against tenants having common of pasture, notwithstanding they have also some other right on the common, as a right to dig for sand, &c. if he leave sufficient common of pasture. *Shakespear* v. *Peppin.* 6 T. R. 741

6. By a grant of a manor with an exception of the wastes, they are thereby severed from the manor, though the copyholders continue to have a right of common thereon by immemorial custom; and after a grant of the soil of those wastes to trustees for the use of the copyholders in free socage, the lands when inclosed will be freehold and not copyhold. *Revell* v. *Jodrell.* 2 T. R. 415

7. Where by the terms of an inclosure-act for inclosing the wastes of a manor, a certain portion was to be made to the lord in lieu of his right and interest in the soil, and the residue was to be allotted to the several tenants in fee, discharged from all customary tenures, &c. a saving clause, reserving to the lord of the manor, all seignories incident to the manor, and all *rents*, fines, services, &c. *and all other royalties and manerial jurisdictions whatever*, will not reserve mines under those allotments to the tenants; though it appear that there was a subsisting lease of such mines at the time the act passed, granted by the lord of the manor. *Townley* v. *Gibson.* 2 T. R. 701

8. The owner of a tenement may have two distinct rights of common for his cattle levant and couchant upon such tenement upon different wastes in different manors under several lords: and therefore an allotment under one inclosure-act in lieu of his right of common upon one of such wastes will not do away or lessen his claim for an equal allotment with other commoners under a subsequent act for inclosing the other waste. *Hollingshead* v. *Walton.* 7 E. R. 485

9. There can be no approvement by the lord of the manor in derogation of a right of common of Turbary. *Grant* v. *Gunner & al.* 1 W. P. T. 435

10. Twenty years adverse possession of a waste inclosed is a bar to the entry of a commoner. *Hawke* v. *Bacon.* 2 W. P. T. 156

11. An inclosure made from the waste 12 or 13 years, and seen by the steward of the same lord from time to time, without objection made, may be presumed to have been made by license of the lord; and ejectment cannot be brought against the tenant as a trespasser, without previous notice to throw it up. *Doe d. Foley* v. *Wilson.* 11 E. R. 56

III. *Surcharging, or otherwise injuring, and the Remedies for.*

1. One commoner, who has surcharged, may nevertheless maintain an action against another for surcharging the common. *Hobson* v. *Todd.* 4 T. R. 71
2. *A.* being possessed of a quantity of land in a common field, and having a right of common over the whole field, and *B.* having also a right of common over the whole field, they enter into an agreement for their mutual advantage and convenience, not to exercise their rights for a certain term of years, and each party covenant to that effect. if, during, the term, the cattle of *B* come upon the land of *A.*, he may distrain them damage feasant; for the general rule that one commoner cannot distrain the cattle of another is superseded by the special agreement, by which, (with regard to *A.*,) *B.* became a stranger.—And *A.* may in his replication (in answer to a plea pleaded (by *B.* of his right of common, in bar of the cognizance of *A.*) set forth the special circumstances of the agreement and covenants, and leave the construction of them to the court.
Whiteman v. *King.* 2 H. B. 4
3. A commoner cannot justify cutting down trees planted by the lord on the waste though there be not a sufficiency of common left; but his remedy is by action on the case, or by assise.
Sadgrove v. *Kirby.* 6 T. R. 483
(Affirmed in *Cam. Scac.*
Kirby v. *Sadgrove.* 1 B. & P. 13.)
4. But if the lord totally exclude a commoner from the common, the commoner may do whatever is necessary to let himself into the common.
6 T. R. 485
5. The right of commoners in a common may be subservient to the right of the lord in the soil; so that the lord may dig clay-pits there, or empower others to do so, without leaving sufficient herbage for the commoners, if such a right can be proved to have been always exercised by the lord. *Bateson* v. *Green.* 5 T. R. 411
6. So the lord may, with the consent of the homage, grant part of the soil of the common for building, if he has immemorially exercised such a right.
Folkard v. *Hemmett, Sittings after E.* 16 *G.* 3. *C. B.* 5 T. R. 417, *n.*
7. The immemorial exercise of such a right by the lord is evidence that he reserved that right to himself when he granted the right of common to the commoners. 5 T. R. 417
8. A commoner may maintain an action on the case for an injury done to the common, by taking away from thence the manure which was dropped on it by the cattle; though his proportion of the damage be found only to the amount of a farthing; at least the smallness of the damage found is no ground for a non-suit.
Pindar v. *Wadsworth.* 2 E. R. 154

CONSTABLE.

(And see COUNTY RATE 1, and OFFICE 1. 2.)

1. A constable cannot act as such out of his particular district; even though a warrant is directed to *A.*, constable of *B.*; to *C.* and to all other officers of the peace, in the county of *D.* *Blatcher* v. *Kemp*, cited. 1 H. B. 15, *n.*
2. *Qu.* Whether goods distrained in the parish of *A.*, can be appraised by apprasiers, sworn before the constable of the parish of *B.*; each parish being in the same hundred, but in different divisions; and each having different constables. 1 H. B. 13

CONVICTION.

I. *Evidence, Statement of.*

1. The magistrates ought to state in the conviction, the whole of the evidence for and against the defendant.
R. v. *Clarke.* 8 T. R. 220
2. Where power of conviction is by statute given to a magistrate, he is the sole judge of the weight of the evidence given before him; and the Court of K. B. will not examine whether or not he has drawn a right conclusion from the evidence: but if no evidence appear in the conviction to support a material part of the information, the court will quash the conviction. *R.* v. *J. Smith.* 8 T. R. 588
3. Conviction quashed because the witness was not sworn and examined in the defendant's presence.
R. v. *T. S. Crowther.* 1 T. R. 125
4. It is not sufficient to read over the deposition of a witness in the defendant's presence. 1 T. R. 125
5. But if the defendant confess the charge, the irregularity is cured.
R. v. *S. Hall.* 1 T. R. 320

6. In a conviction, if the defendant appear and plead, and the evidence be given on the *same day*, the court will intend that the evidence was given *in the defendant's presence*.
2 T. R. 18; 7 T. R. 152
7. And this, even though it be stated that the appearance was at *A*, and that the evidence was given at *B*.
R. v. *Swallow.* 8 T. R. 284
8. It is a good objection to a conviction, that it does not *state* that the evidence was given in the defendant's presence.
6 T. R. 75
9. Per Lord Kenyon. One point in the case of *R.* v. *Thompson* (2 T. R. 18 ante art. 6) has always afforded me great dissatisfaction; namely, that the court would in any case intend that the evidence was given in the defendant's presence, without its so appearing upon the face of the conviction.
1 T. R. 618, *n.*
10. It is enough that the conviction sets forth that the witness was examined on oath, without stating that the magistrate had authority to administer the oath. *R.* v. *Picton.* 2 E. R. 195

II. *Form of.*

1. The stat. 36 *G.* 3. *c.* 60. enacting, that no person shall expose to sale metal buttons marked with the word *gilt* (the same not being really gilt), *knowing* the same not to be gilt; a conviction, charging that the defendants did the act *unlawfully* and *fraudulently contrary to the form of the statute*, is bad, without an express charge that they did it *knowingly;* and such defect is not aided by a proviso in the statute "that no conviction should be set aside for want of form, or through the mistake of any circumstance provided the *material* facts *alledged* were *proved;*" for this requires all material facts to be alledged, and knowledge is a material fact to constitute the offence.
R. v. *Jukes & al.* 8 T. R. 536
2. So it is a material fact that the defendant does not come within any exception in the enacting clause, and such a defect is not aided by the proviso. *R.* v. *Jukes & al.* 8 T. R. 542
3. A summary conviction for any offence created by statute, must negative every exception contained in the clause creating the offence. 8 T. R. 542
4. Though it be proper for a magistrate in drawing up a conviction on a statute to state the particular evidence of the fact on which his judgment is founded, and not merely the legal effect of such evidence, in the words of the statute, yet a conviction in the latter form is valid in law: but the magistrate subjects himself to an information if he endeavour to shelter himself from detection by mis-stating such legal result when the evidence would not warrant it.
R. v. *Pearse.* 9 E. R. 358
5. It is no objection to a conviction, to state, that the informer *came* and *gave* the justice to be informed, *&c.* in the preterperfect tense.
R. v. *S. Hall.* 1 T. R. 320
6. A conviction must contain an adjudication, whether the punishment be or be not fixed by the statute.
R. v. *J. A. Harris.* 7 T. R. 238
7. Where a conviction, after setting forth the evidence, stated, "thereupon the defendant, on, *&c.* at, *&c.* before me, *&c.* by the oath of one credible witness, according to the form of the statute is convicted;" it was held to be an adjudication by the justice, that he is *convicted of the offence.*
R. v. *Thompson.* 2 T. R. 18
8. A commitment on stat. 17 *G.* 2. *c.* 5. (the vagrant act), must be a commitment in execution [see BAIL VII. 7. *R.* v. *Brooke*], and is therefore bad if it merely state the charge, and order the party to be committed for safe custody till the sessions, without *convicting* the offender of the charge.
R. v. *Rodes.* 4 T. R. 220
9. Outlawry is a *conviction* within the meaning of 14 *G.* 2. *c.* 6. § 1. against sheep-stealing. *R.* v. *Vandell.* 4 T. R. 521
10. An allegation in an information, that the defendant bought "a certain quantity of wheat containing divers, to wit, fifteen bushels," is sufficiently certain.
R. v. *J. Arnold.* 5 T. R. 356
11. A conviction on the excise laws, against *A. and Company*, cannot be supported.
R. v. *Harrison & Co.* 8 T. R. 508
12. Where justices of the peace are required by a penal statute to distribute the penalty on conviction among certain persons according to their discretion, an adjudication that the forfeiture be *disposed of as the law directs*, is bad, and the court will quash the conviction.
R. v. *Dimpsey.* 2 T. R. 96
13. In such cases the justices ought to adjudge what the several proportions should be. *ib.*

14. The statute 42 *G.* 3. *c.* 119. against illegal lotteries, directing the penalty to be distributed, 1-3d to the king, 1-3d to the informer, and 1-3d to *the person apprehending or securing the offender*; a conviction directing the penalty to be distributed *as the law directs*, without ascertaining to whom the last third is to be paid (the person being uncertain), is bad.

K. v. *Seal.* 8 E. R. 568

But it need not appear that there was in fact any illegal lottery, if it be shewn that the money was taken for that purpose. *ib.*

A conviction stated to be made by justices of the peace, &c. *at the public office in Great Marlborough-street*, &c. does not legally denote that it was made by one of the police magistrates under the stat. 42 *Geo.* 3. *c.* 76, &c. *ib.*

15. Where an act gives power to a magistrate on a summary conviction to award the *reasonable* charges of taking a distress, he must ascertain the amount in the conviction; and an adjudication that the defendant shall pay the *reasonable charges* of the levy is bad.

R. v. *Symonds.* 1 E. R. 189

16. A conviction, adjudging a distribution of part of a forfeiture (which a statute says shall be paid to the overseers *of the poor of the parish* for the use of the poor of the parish) to the overseers *of the poor of a township*, cannot be supported.

R. v. *W. Priest.* 6 T. R. 538

17. Whether the conviction could be supported, if it appeared on it that the township maintained its own poor separately? *Qu.* 6 T. R. 538

18. A conviction on the stat. 5 *Geo.* 3. *c.* 14. for fishing without consent of the owner, "in part of a certain stream which runneth between *B.* in the parish of *A.* in the county of *W.* and *C.* in the same parish and county," quashed; because it did not appear that the intermediate course of the stream between the two *termini* in which the offence was alleged to be committed, was in the county of *W.* and within the jurisdiction of the convicting magistrate.

R. v. *Edwards.* 1 E. R. 278

19. One may be convicted on the stat. 28 *G.* 3. *c.* 57, as *the driver* of a stage coach, for permitting and suffering beyond the proper number of persons to go upon the roof of it; although he be not stated to be a driver *employed* by the owner, and although he *did not appear when summoned* before the magistrate; in which case the 2d sect. of the act directs, that the owner shall *be liable to the penalty thereby laid on such driver.*

Rex v. *Barker.* 3 E. R. 504

18. The stat. 39 & 40 *G.* 3. *c.* 106, enacts that all *agreements*, &c. in writing or not, by any journeyman manufacturers, for *controlling* any person carrying on any manufacture, &c. in the conduct thereof, &c. shall be illegal; and it gives a summary form of conviction, in which the offence is required to be stated: held that a conviction, alleging generally that the defendants were concerned in entering into *a certain agreement for the purpose of controlling* A. B. &c. without stating what the agreement was, was bad; even if the variance in stating the agreement to be *for the purpose* of controlling, instead of *for* controlling, were not fatal, *R.* v. *Neild & al.* 6 E. R. 417

19. Where a penalty is to be sued for within a certain time after the offence committed, it must appear on the face of such conviction upon the recital of the evidence of the witness that the prosecution was in time.

R. v. *Woodcock.* 7 E. R. 146

And if the witness be only stated to have mentioned the month and day, omitting the year in which the offence was committed, and there be no reference to connect it with the true date, the omission cannot be supplied by any presumption. 7 E. R. 146

20. A conviction under the malt act 42 *G.* 3. *c.* 38. § 30. stating that *J. F.* deposed before the justices as follows: "that the defendant *is* a maltster, that he, together with one *W. R.* surveyed the malthouse of the defendant *on the 12th of May* now last past, and found a floor of malt in operation very wet, and the said *W. R.* saith that he *surveyed the said malthouse* with the said *J. F.*" It was objected that this evidence did not prove the defendant to have been a maltster at *the time of the offence alleged to have been committed*, for the statement that the defendant is a maltster must refer to the day on which the witness was examined; and *non constat* that the defendant was a maltster on the 12th of May, but held good, for the malthouse could not have been *surveyed* if the defendant had not entered it *as a maltster.*

R. v. *Crisp.* 7 E. R. 389

III. *Game Laws.*

1. In a conviction on stat. 5 *Ann. c.* 14, for killing game, the *evidence* need not negative every specific qualification under stat. 22 & 23 *Car.* 2. *c.* 25.
R. v. *T. S. Crowther.* 1 T.R. 125
2. In a conviction on § 4. of the stat. 5 *Ann. c.* 14. evidence that "the defendant kept and used a gun to kill and destroy the game," was held sufficient. *R.* v. *R. Thompson.* 2 T.R. 18
But see 7 T.R. 152: and 8 T.R. 222
3. Proof that the defendant "did keep and use a gun to kill and destroy the game," is sufficient evidence to support a conviction on the game laws, though the witness add his reasons for believing it, "that the gun was fired by the defendant, who was walking about a piece of ground at *H.* with that apparent intent."
R. v. *Davis.* 6 T. R. 177
4. If a conviction before a justice of peace on the game laws state that the defendant was present at the time when the information was read and the witnesses examined, and that when called on for his defence, he produced no evidence, and did not require any further time; that is sufficient, without stating that he was previously *summoned to answer, &c.* *R.* v. *Stone.* 1 E. R. 639
5. *Qu.* Whether it be necessary for the prosecutor to negative by evidence, as well as in the information, the qualifications of the defendant to kill game? —and *Qu.* Whether the negative of such qualifications must be repeated in the adjudicatory part of the conviction or whether it be not sufficient to convict the defendant of the offence *aforesaid*, referring to the previous part of the conviction, which sets forth the information in which such qualifications were specifically negatived. 1 E. R. 639
6. A conviction wherein the information does not negative the defendant's qualifications set forth in the statute 22 & 23 *Car.* 2. is bad. *Rex* v. *Jarvis, Hil.* 30 *Geo.* 2. 1 E. R. 643, *n.*
7. A conviction in the 4th section of the stat. 5 *Ann. c.* 14. for keeping a dog and gun to kill game, without being qualified, must be made within three months after the offence committed; and if the hearing of the matter be adjourned over that time, though with the consent of the defendant, a conviction afterwards is bad,
Rex v. *Tolley*, 3 E. R. 467

IV. *Lottery Acts.*

1. Conviction on stat. 22 *G.* 3. *c.* 47, for insuring a ticket in the lottery, authorized by 25 *G.* 3. quashed, because the information did not state that the ticket on which the insurance was made was a ticket in the *state lottery*.
R. v. *Trelawney.* 1 T. R. 222
2. Conviction on the same act quashed because the evidence did not state the offence to have been committed where laid. *R.* v. *Jefferies.* 1 T. R. 241
3. Conviction on the same act "for the *said* offence," where there were two distinct offences charged in the information, was held bad.
R. v. *Solomons.* 1 T. R. 249
4. An unstamped agreement to sell a share of a ticket in the lottery, before the tickets are deposited with the commissioners, is within the penalty inflicted by § 21 of that act.
R. v. *Hawkesworth.* 1 T. R. 450

V. *Separate Penalties.*

(And see tit. GAME, & 3 T. R. 509. tit. LITERARY PROPERTY.)

1. *Qu.* Whether a person can be convicted of two distinct penalties in the same information? but if he can, he ought to be convicted of both.
1 T. R. 249
2. A defendant may be convicted of several offences in the same conviction.
R, v. *Swallow.* 8 T. R. 284
4. Two persons cannot be convicted in separate penalties under statute 5 *Ann. c.* 14. § 4. for using a greyhound to destroy game.
R. v. *Bleasdale.* 4 T. R. 809
4. *Each* of several defendants convicted on stat. 1 *W.* & *M. c.* 18. for disturbing a dissenting congregation, is liable to the penalty of 20*l.* imposed by that act. *R.* v. *Hube.* 5 T. R. 542

VI. *Quashing, or appealing from.*

1. The court, on deciding on the legality of a conviction, cannot take cognizance of any fact contained in the *certiorari* by which the conviction is removed. *R.* v. *J. Liston.* 5 T. R. 338
2. And therefore they refused to quash a conviction on stat. 12 *G.* 2. *c.* 28. directing the penalty to be distributed according to that act, though it appeared in the *certiorari* that the conviction was made at one of the seven public offices established by stat. 32

G. 3, *c.* 53. which directs that all penalties levied by the justices under that act shall be paid to the receivers appointed by that act. 5 T. R. 338

3. *Qu.* Even if that fact had appeared on the conviction, whether it would have been a legal objection to it ?
5 T. R. 341

4. The Legislature did not intend by stat. 32 *G.* 3. *c.* 53. to alter the form of conviction; and until the conviction the receiver cannot maintain an action for money had and received to recover the sum: *per Buller*, J.
5 T. R. 341

5. An appeal against a conviction on stat. 24 *G.* 3. stat 2. *c.* 31. for not entering horses, &c., must be to the quarter sessions next after the *conviction*, and not after the *execution*.
Prosser v. *Hyde*. 1 T. R. 414

VII. *Surplusage in.*

1. Surplusage will not vitiate a conviction. 4 T. R. 767

2. If a conviction under stat. 31 *G.* 3. *c.* 21. § 4 which enacts that all convictions against that act may be made out "in the form *or to the effect* following" (giving the form), contain all the substantial parts of that prescribed, it is good, though it also contain something more.
R. v *J. Jefferies*. 4 T. R. 767

3. Where an informer need not negative any of the exceptions in a statute, but negatives some of them only, that part of the information will be rejected as surplusage. 1 T. R. 320

4. If the convicting magistrate give a proper date to the time of the conviction upon the face of it, and afterwards add an impossible date to the time when he set his hand and seal to the conviction (being before the offence committed), the latter may by subjected as surplusage.
R. v. *Picton*. 2 E. R. 195

5. An information founded on a penal statute must negative the exceptions in the enacting clause creating the penalty, and also those contained in a preceding section to which the enacting clause refers in express terms.
R. v. *Pratten*. 6 T. R. 559

COPYHOLDS.

I. *General Matters relating to.*

1. One may hold the *prima tonsura* or fore-crop of land as copyhold and another may have the *soil* and every other *beneficial enjoyment* of it as freehold. *Stammers* v. *Dixon*. 7 E. R. 200

2. The freehold of an estate parcel of a manor and demisable only by the leave of the lord passing by surrender and admittance to hold to the tenant and his heirs of the lord by the accustomed rent, &c. is in the lord and not in the tenant though not holden at the will of the lord. *Doe d. Cook et Ux.* v. *Danvers*. 7 E. R. 298

3. Where the tenants of a manor, formerly belonging to a monastery, holding *by border service, and the defence of Tynemouth Castle*, under *copy of court roll*, and whose estates passed *by surrender and admittance*, shewed in evidence by ancient surrenders, admissions, Exchequer decrees between the lords and tenants, and by an inquisition of the jury at the court-baron of the lord; that they were *copyholders of inheritance*, with *fines certain*, holding *according to the custom of husbandry of the manor (or according to the custom of the manor* generally,) without stating them to hold *at the will of the lord*; admitting this evidence to outweigh proof of minister's accounts; a grant of the manor from the crown including these estates under the name of *tenements of husbandry*; subsequent mesne conveyances reserving the coal-mines, &c. in certain districts; and modern admissions (including admissions of the several tenants to the estate immediately in question): in all which they were stated to hold *at the will of the lord* as well as *according to the custom of husbandry of the manor*, &c.; yet as there was evidence for more than a century past that the lord had leased the coal and lime-stone under the copyhold lands in different parts of the manor, and had received rent for the same; and that the lessees of the lord, and not the tenants had taken the coals and lime-stone; the Court of K. B. held that such *acts of ownership* explained the nature of the tenure, *according to the custom of husbandry of the manor*, &c. and shewed, in aid of the other evidence, that the *freehold* was in the *lord*, and not in the *tenants*. And at any rate the evidence preponderating

so much in favour of the lord, the Court of K. B. would not disturb a verdict given for him.

Brown v. *Rawlins.* 7 E. R. 409

4. One who has a *primâ facie* title to a copyhold is entitled to inspect the court rolls, and take copies of them, so far as relates to the copyhold claimed, though no cause be depending for it at the time. *K.* v. *Lucas.* 10 E. R. 235

II. *Customs relating to.*

1. Custom is the very essence of a copyhold; and if the custom be silent, the common law must regulate the course of descent. *Denn d. Godwin & al.* v. *Spray.* 1 T. R. 474 (And see 1 T. R. 466. tit. CUSTOM.)

2. A copyhold cannot be created by operation of law, but must have been demised and demisable by copy time out of mind.

Revell v. *Joddrell.* 2 T. R. 415 & 705

3. If there be a custom within a manor for a lord to grant parcels of the waste by copy of court roll, the premises granted in that mode are well described as copyhold premises, though the date of the grant be modern.

Ld. *Northwick* v. *Stanway.* 3 B. & P. 346

4. A lord of the manor cannot seize a copyhold estate as forfeited *pro defectu tenentis*, without a custom.

Roe d. Tarrant v. *Hellier.* 3 T. R. 162

5. Therefore, where on the death of a copyholder of inheritance, the lord, after three proclamations for the heir to come in, seized the estate into his hands, and afterwards granted it in fee to another, the court considered it as an *absolute seizure*, and consequently irregular, there being no custom to warrant it; and being irregular as an absolute seizure, it could not afterwards be set up by the lord as a *seisure quousque.* 3 T. R. 162

6. Under a grant by copy of court-roll of a reversionary estate to *A.* (who had before a life-estate in the premises) *habendum to him for the lives of B. and C.*, his grandsons, *during the life of either of them longest living, successively*, according to the custom, &c. reserving a heriot and 6*s.* rent; *A.* alone takes the legal estate in reversion, and not the *cestuy que vies;* there being no custom to enable them to take; although they were stated to be admitted tenants in reversion.

And though in consideration of the fine paid by the grandfather, the lord suffered the first in succession of the *cestuy que vies* to enter as tenant upon the death of his grandfather, and received the 6*s.* rent from him till his death; yet he not dying seised of the legal estate, his widow could not claim her free bench according to the custom.

Nor did such receipt of rent from the *cestuy que vie* constitute a tenancy from year to year, so as to entitle his widow to notice to quit, the rent not being received as between landlord and tenant, but attributable to another consideration. *Right d. The Dean and Chapter of Wells* v. *Bawden.* 3 E. R. 260

7. Devisees of a copyhold holding as tenants in common have several estates to which they must be severally admitted; and for which several services are due to the lord: and several heriots on the death of each tenant: and the multiplication of heriots and fees on admission still continues, notwithstanding the reunion of the same land afterwards in one person; the estates or interests in the land once divided in severalty continuing several.

Attree v. *Scutt.* 6 E. R. 476

8. Ancient admissions by the description of *tres acras prati*, may only carry the fore crop, or *prima tonsura*, if, in fact, no more has ever been enjoyed under such admissions.

Stammers v. *Dixon.* 7 E. R. 200

9. Where three lives in a copy are to take successivè, and a father, the sole purchaser, puts in the lives of himself and his two sons, in general the sons shall take beneficially, unless it appear by any concurrent act of the father that he did not so intend it; as by taking at the same court a licence from the lord to himself and his mother (who had her free bench) to lease for 70 years. In which case, if the father afterwards lease by way of mortgage pursuant to such licence, and there be a custom in the manor for the first taker to dispose of the estate as against the other lives, such custom may operate to devest the legal estate of the lives in reversion, and give it to the lessee; or if that were doubtful, or if the licence of the lord might be construed to extend only to the first taker of the new copy *jointly* with his mother, and the first taker *alone* executed such licence after her death; yet a court of equity (even if the surviving life, the son, succeeded at law on his first legal title) would make the son, the surviving life, con-

vey to his father's lessee and pay all the costs in law and equity. *Swift* d. *Farr*, v. *Davis*. 8 E. R. 354. *n.*

10. A copyhold having descended to a wife as heir at law, who died before admittance, having first borne a child to her husband, which died an infant, the husband was held entitled to hold for his life, in the nature of a tenant by the curtesy of *England*, according to the custom of the manor; though the only evidence of such custom on the rolls was three instances of husbands admitted as tenants by the curtesy, according to the custom, whose respective wives had been admitted during their lives; the title of a wife claiming as heir by descent being complete without admittance, by the general law of copyhold, and the title of a tenant by the curtesy being also by operation of law. *Doe d. Milner* v. *Brightwen*. 10 E. R. 583

11. And having such good title to the possession as tenant by the curtesy, his possession of the copyhold after his wife's death will be referred to that, and not to any adverse title: though he were admitted after his wife's death to hold to him pursuant to the settlement, by which the estate of the wife was limited to the survivor in fee; so as to let in the title of the heir at law of the wife in ejectment brought within 20 years after the husband's death. *ib.*

12. And though 1-3d of the copyhold had been settled many years before upon a third person for life; but no surrender having been made to the trustees under the settlement, the legal estate had remained in the heirs of the tenant last seized and admitted; and the steward of the manor appointed by the heir at law and her husband had in his accounts after the wife's death (which was evidence of his having done the same in her lifetime) for above 20 years back, debited himself with the receipt of 2-3ds of the rent for the husband on account of his wife, and the remaining 1-3d for such other person claiming under the settlement: yet such payment to the latter must be taken to have been made by the consent of the person entitled at law to the whole; so as to do away the notion of an adverse possession by the husband of that 1-3d, distinct from his possession of the other 2-3ds, as tenant by the curtesy after his wife's death; in answer to a claim by the heir at law of the wife against the devisee of the husband who set up an adverse possession for above 20 years after the wife's death. *ib.*

Nor will any release from the heir at law living at the time of such curtesy estate be presumed during that period; nor after his death from the present heir at law, who might be called upon in equity to discover it, if given; though such release if proved or presumed would bar the copyholder's claim. *ib.*

III. *Enfranchisement of.*

1. The enfranchisement of a copyhold may, upon proper evidence, be presumed even against the crown. And where a surrender had been made to churchwardens and their successors in 1636, without naming any rent: but in 1649 *the parliamentary survey* charged the churchwardens with 6*d.* rent, under the head of "*freehold* rents;" and there was no evidence of any different rent having been paid since that time, and receipts had been given for it, as for a *freehold* rent, by the steward of the manor: held that this was evidence to be submitted to a jury, on which they might presume a grant of enfranchisement, although the manor had continued out in lease from before 1636 to 1804; and though a tablet of parochial benefactions, at least as old as 1656, which was suspended in the parish church, noticed the gift of the copyhold by surrender, but did not notice any enfranchisement of it.
Roe d. Johnson v. *Ireland*. 11 E. R. 280

IV. *Fines on Admission.*

1. A covenant made by a copyholder with a stranger to assign and surrender his copyhold to him, which covenant is afterwards presented by the homage, does not give the lord any right to a fine. *R.* v. *Hendon (Lord of Manor)*. 2 T. R. 484

2. *A.* a copyholder covenants to assign and surrender to *B.*, which covenant is presented by the homage, but before any surrender *B.* assigns his interest to *C.*, to whom *A.* surrenders; *C.* has a right to be admitted, on payment of a fine for his own admittance only. 2 T. R. 484

3. A covenant to surrender a copyhold to a purchaser, and to make and do all acts, deeds, &c. for the perfect surrendering and assuring the premises at the costs and charges of the seller, is

not broken by non-payment of the fine to the lord on the admission of the purchaser; for the title is perfected by the admittance of the tenant, and the fine is not due till after the admittance.

Graham v. *Sime*. 1 E. R. 632.

4. If an assessment of a copyhold fine be entered in the court rolls as of 100*l*. but that out of especial favour the lord remitted 40*l*. and thereby reduced it to 60*l*., and the lord sued for the fine, and the jury finding the annual value of the premises 30*l*., give a verdict for 60*l*., the lord cannot retain the verdict for the sum actually due, but must make a new assessment; the old assessment, notwithstanding the remitter, being in law an assessment as of 100*l*.

3 B. & P. 346

5. The lord may recover from a copyholder the fine assessed by him on admittance, not exceeding two years value of the tenement, although there be no entry in the assessment of such fine on the court rolls, but only a demand of such a sum for a fine after the value of the tenement had been found by the homage. Ld. *Northwick* v. *Stanway*.

6 E. R. 56

V. *Forfeiture of.*

1. If one of several co-heirs of a copyholder be a femme covert at the time of the ancestor's death, and the lord seize the whole estate (in default of the heir's not coming in to be admitted after three proclamations), without first appointing an attorney or guardian for the femme covert, according to the requisites of stat. 8. G. 1. c. 29. a seizure of the *whole* estate is irregular, though it be not known to the lord that one of the heirs is a femme covert.

Roe d. Tarrant v. *Hellier*. 3T. R. 162

2. A forfeiture by a copyholder's levying a fine may be waived by the lord.

3 T. R. 162

3. A forfeiture of a copyhold estate can only be taken advantage of by him who is lord at the time of the forfeiture, except in those cases where the act of forfeiture destroys the estate. 3T. R. 162

4. A fine levied by a copyholder who continues in possession, is void as against the lord. 3 T. R. 162

5. Whether the lord's right of entry for a forfeiture is not barred after 20 years by the statute of limitations? *Qu.*

3 T. R. 162

6. The proclamations need not enumerate the *particular* estate of which the tenant died seised. 3 T. R. 162

7. Nor is it necessary they should be proved by *vivâ voce* testimony; the entry in the court-rolls is sufficient.

3 T. R. 162

8. A copyholder demised for one year, and from thence from year to year for the term of 13 years more, *if the lord would license*, and *so as the same should not be liable to forfeiture*: held that the licence of the lord was a condition precedent to the lease for the further term of 13 years; and the lord having given notice that he would not give such licence, the assignee of the lessor, to whom the premises were surrendered, was holden entitled to recover in ejectment against the tenant after six months' notice to quit: although it appeared that such surrenderee was a trustee for the lord (the real purchaser), who had notice of the terms of the demise when he purchased, with an *exception* in the contract of purchase, of *all subsisting leases*, and afterwards accepted of quit-rent from the tenant; the consideration of these latter circumstances belonging to a court of equity. *Doe d. Nunn* v. *Luffkin & al.* 4 E. R. 221

9. The same case being sent by the Lord Chancellor for the opinion of the Court of C. P., with the additional fact, that the lessor had covenanted that the lessee should quietly enjoy during the term; that court certified their opinion; that the ejectment would lie; and that no action would lie on the covenant for quiet enjoyment.

Luffkin & al. v. *Nunn & al.* N. R. 163

10. Where a copyholder in fee, who had paid a fine on his original admittance, surrendered to the use of himself for life, remainder to his wife for life, remainder over: on which surrender and re-admittance no new fine was paid; and by the custom a remainder-man coming into possession on the death of tenant for life must be admitted and pay a fine: held, that such a custom is good; and that on the death of tenant for life, the next in remainder not coming in to be admitted and pay his fine after proclamations made and presentment by the jury, the lord may seize *quousque* the tenant comes in, and maintain ejectment to recover the possession in the mean time. And such proclamations being in general terms for *any* person to come in and make title, &c. and the presentment of default being also general, are good; though the person next in remainder

were *known* and *named* in the surrender.
Doe d. Whitbread v. *Jenney*. 5 E. R. 225

11. Entries on the rolls of a manor court, of admissions of tenants in remainder after the determination of the estate of the last tenant's widow, who held *during her chaste viduity*, are evidence of a custom for the widow to hold on that condition, so as to maintain ejectment against her as for a forfeiture, on proof of her incontinence; although there were no instances in fact stated on the rolls or known of such a forfeiture having been enforced. *Doe dem. Askew* v. *Askew*. 10 E. R. 520

12. A copyholder licensing his lessee to commit waste, on condition of his doing a subsequent act to diminish the damage thereby occasioned, cannot eject him for a forfeiture incurred by his committing the waste without performing the subsequent act.
Doe d. Wood v. *Morris*. 2 W. P. T. 52

VI. *Surrender, Effect of.*

1. The title to copyhold lands relates back from the time of the admittance to the surrender, as against all persons but the lord; so that the surrenderee may recover in ejectment against the surrenderor on a demise laid between the times of surrender and admittance.
Holdfast d. Woollans v. *Clapham*. 1 T. R. 600

2. The surrenderor, before admittance, is considered as a trustee for the surrenderee; and as between them, admittance is not at all necessary to maintain ejectment. 1 T. R. 600

3. Whether the surrenderee, before admittance, can recover against the lord, or a stranger? *Qu.* 1 T. R. 600

4. In order to effectuate the intention of the parties, the court will construe the word "*or*" to mean "*and*," as well in a surrender of copyhold premises as in a will. *Wright* v. *Kemp*. 3 T. R. 470

5. Therefore where the surrender was to the surrenderor himself for his life, and after his decease to his widow *durante viduitate*, and upon her decease or marriage, to *W. Wallis* for life, remainder to the issue of his body; with a proviso that in case *W. W.* should die in the lifetime of the surrenderor, or without issue, *&c.* remainder to the surrenderer's right heirs; the issue of *W. W.* were held entitled to the premises after the death of the surrenderor and his widow, although *W. W.* died in the lifetime of the surrenderor. 3 T. R. 470

6. A surrender of copyhold lands to the use of a will, only operates on the estate which the surrenderor has at the time of the surrender.
Doe d. Ibbot v. *Cowling*. 6 T. R. 63

7. And therefore if a copyholder, having an estate *pur autre vie*, surrender all his estate in possession, remainder, or expectancy, to the use of his will, and afterwards take the fee by descent, and then dispose of the fee by will, the fee will not pass by it.
[See tit. DEVISE.] 6 T. R. 63

8. Till the admittance of the surrenderee of a copyhold upon mortgage the surrenderor continues the legal tenant, and he cannot devise the equity of redemption even after the surrender made, without a new surrender to the use of his will, but the legal estate, which on his death descends to his heir at law, will carry the equity of redemption also to the heir in respect to the mortgagee.
Doe d. Sheuen, Widow, v. *Wroot*. 5 E. R. 132.

9. *A.*, a copyholder for life, remainder to *B.*, surrenders his own and *B.*'s estate (over which latter he had no controul, and by which he let in *B.*'s remainder), and takes a new copy for the lives of himself, *C.*, and *B.*, successively; and on *A.*'s death, after 20 years had run against B., *B.* enters on the possession then vacant: held that as against *C.*, who had no possession and no title, *B.* might defend his legal title, coupled with possession, in ejectment; however 20 years adverse possession by *A.* might have barred *B.*'s possessory right against him; or might have disabled *B.*, if he had continued out of possession, from recovering in ejectment. *Doe* v. *Reade*. 8 E. R. 353

10. *John Lealand* surrendered a copyhold in his occupation, to the use of *Joseph* Lealand and *John* Lealand *his son*, for their lives and the life of the survivor; remainder to the heirs of the body of the *said John* Lealand, *son of Joseph* L.; remainder to the right heirs of *the said* John Lealand: held, that the ultimate remainder was meant for the right heirs of *John the surrenderor*; as well because *John the surrenderee* is before described with the addition of *the son of Joseph*; as of the manifest futility of giving *John the surrenderee* an estate *tail*, and afterwards a fee in succession. Though if the construction had even been left

doubtful, the ultimate remainder would have continued in the surrenderor.
Roe d. Hucknall v. *Foster*. 9 E. R. 405

11. Devisees of contingent remainders in a copyhold, not being in the seisin, cannot make a surrender of their interest; nor will such a surrender operate by estopel against the parties or their heirs. *Doe d. Blacksell and al.* v. *Tomkins*. 11 E. R. 185

12. A surrender out of court to the use of his will, made by the surrenderee of a copyhod before his admittance, is absolutely void and of no effect, and cannot be made good by his subsequent admittance. *Doe d. Tofield*, v. *Tofield*. 11 E. R. 246

13. A Copyholder surrenders "his copyhold cotiage *with a croft adjoining*" and a common right, &c. belonging to the same "*all which premises* (as the surrender described) *were then in his own possession:*" and on the same day he devises "all his copyhold *cottage and premises then in his own possession.*" In fact *the croft*, between which and the cottage and garden there was only a gooseberry hedge, was in the actual occupation of a tenant at the time. Yet the Court of K. B. held, that the whole passed under the description of "all his copyhold *cottage and premises;*" the words, "*then in his own possession,*" being merely a mistaken description, following the mistake of the surrender, which mentions *the croft* with the rest as then being in his possession. *Goodright d. Lamb* v. *Pears*. 11 E. R. 58

VII. *Timber.*

1. Where a copyhold is granted for three lives to a man and his heirs, and he has no power of compelling the lord to renew, on the falling in of the lives, the copyholder cannot cut timber growing on the estate.
Mardiner v. *Elliot*. 2 T. R. 746

2. *Secùs*, if the copyholder has a power of nominating his successors. 2 T. R. 746

3. Where a copyholder of inheritance, having power by custom to cut timber, surrendered to the use of his will, and devised to *A.* for life, without impeachment of waste, with remainders over, though there was no instance in fact of a copyholder for life in the manor cutting timber; yet the right being annexed to the fee and inheritance, the copyholder in fee, in carving out his estate, may make a tenant for life dispunishable of waste; and at any rate, the lord cannot enter upon the copyholder for life's estate, as for a forfeiture, upon his cutting timber; for the injury, if any, is to the remainder-man of the inheritance. *Denn d. Joddrel* v. *Johnson*. 10 E. R. 266

4. Where copyholder for life cut trees, though none were appied to the repair of the premises till several months after, and after ejectment brought as for a forfeiture, and most of them still remained unapplied, but parts of the premises were still out of repair; it is a question for the jury whether they were cut *bonâ fide* for the purpose of repair, and were in a course of application for that purpose: and there being no evidence that they were to be applied to any other purpose, the Court of K. B. refused to set aside a verdict for the defendant.
Doe d. Foley v. *Wilson*. 11 E. R. 56

CORONERS.

1. The coroners of franchises that do not contribute to the county rates, are not entitled to the fees given by stat. 25 *G.* 2. c. 29, or to any fees to be paid by the county. *R.* v. *The Justices of W. R. Yorkshire*. 7 T. R. 52

2. A mandamus to the justices in sessions, to allow an item of charge in the coroner's account, refused; because the justices were of opinion, under the circumstances, that there was no ground to suppose that the deceased had died any other than a natural, though a sudden death; and therefore that the inquisition had not been duly taken; and the Court of K. B. seeing no reason for interfering with that judgment.
R. v. *The Justices of Kent*, 11 E. R. 229

CORPORATIONS.

I. *Bye-Laws; of their making, and of actions on them.*

1. A bye law may be good in part and bad in part, where the two parts are entire and distinct from each other.
R. v. *Faversham Fishermen Company*. 8 T. R. 356

2. A corporation created by *letters patent*, with a power of making the bye-laws, cannot make any laws to incur a forfeiture. *Kirk* v. *Nowill*. 1 T. R. 118

3. Neither can a corporation, created by *act of parliament*, unless such a power be expressly given. 1 T. R. 118

4. A corporation cannot make a bye-law contrary to their constitution. 6 T. R. 736

5. Therefore, where a charter directed the election of senior bailiff to be made by a majority of a select body, a bye-law giving a casting vote to the presiding officer in case of an equality of votes, was held to be bad. *R.* v. *Ginever.* 6 T. R. 732

6. A charter giving the right of electing an alderman to the mayor and burgesses at large from themselves, a bye-law, stated to be made in 1577, by the then mayor and burgesses, but *not now extant in writing*, whereby the right of electing was restrained to "the mayor and certain of the burgesses of the town, *viz.* the recorder, aldermen, coroners, common council men, and such of the burgesses of the said town as had served or did serve the office of chamberlain or sheriff of the said town and called the *livery or clothing burgesses* for the time being, *or so many of them as should be duly assembled together* for that purpose, whereof the mayor to be one, or the major part of them," was by the court of K. B. held to be a valid and reasonable bye-law But every bye-law may be repealed by the body which made it; and the office of *chamberlain of the town*, as stated in such bye-law was taken to be a corporate office as well as the other offices, the serving of which was made the qualification of the electing burgesses. *R.* v. *Ashwell.* 12 E. R. 22

7. A bye-law requiring the indentures of apprenticeship of such who are bound apprentices to freemen to be inrolled within four months from the date, in order to entitle themselves to their freedom, seems good. *R.* v. *Marshall.* 2 T. R. 2

8. A bye-law made by a company in a corporation to restrain the number of apprentices to be taken by any of the members, is void. *R.* v. *Coopers' Company of Newcastle-upon-Tyne.* 7 T. R. 543

9. A bye-law altering the *qualification* of persons to be taken as apprentices by the members of a corporation, in order to acquire their freedom by a certain servitude, is not warranted by a custom in such body, which claimed by prescription to make bye-laws regulating the *number* of persons to be taken as apprentices. *R.* v. *Tappenden.* 3 E. R. 186

10. A bye-law made by a company carrying on trade in partnership, to prevent any one of the members carrying on a separate trade on his own account, is good, *semble.* 8 T. R. 352

11. A power granted by charter to a company exercising a particular trade in a certain place, to make bye-laws for the government of *all persons* exercising that trade in that place, enables it to make bye-laws binding, as well on persons so exercising the trade who are *not members of the company*, as on those who are. *Butchers' Company* v. *Morey.* 1 H. B. 370

12. The master, wardens, and commonalty of a company cannot sue for a penalty forfeited to the master and wardens, to the use of the master, wardens, and company. The first count in a declaration in debt for a penalty under a bye-law, set forth the charter empowering the company to make bye-laws, the bye-law made, and the breach of it; the second count, omitting the above particulars, stated the penalty as forfeited "under and by virtue of "a bye-law of the company before "that time duly made," &c. and this "count was on special demurrer held "bad." *Feltmakers (Master, Wardens, and commonalty of)* v. *Davis.* 8 B. & P. 98
(But see ASSUMPSIT, III. 7.)

13. A penalty of 20*s.* having been imposed by one of the bye-laws of the butchers' company on all persons selling meat on a *Sunday*, within their jurisdiction, it was declared by the subsequent clause, that if any offender should deny, refuse, or neglect to pay the penalty, he should be liable to an action of debt; held that it was not necessary to prove a previous demand in order to maintain such action, although averred in the declaration. *The Butchers' Company* v. *Bullock.* 3 B. & P. 434

II. *Charters; their construction, &c.*

1. Acceptance of charters, their validity, and pleadings in *quo warranto* informations. See *R.* v. *Amery.* 1 T. R. 575

2. The surrender of a charter is void, if not enrolled. *R.* v. *Osbourne.* 4. E. R. 327

3. A charter ordained that no person should be admitted a burgess except he had for three years before been seized and possessed of an estate of freehold for the term of his life, or some greater estate in land of a certain value; with

an exception of those who should be seized *of such estate* of the said value coming to them by descent or marriage. The Court of K. B. held that one who by virtue of his marriage became seized of an estate in right of his wife for her life was not within the latter exception, and therefore not qualified.. *R.* v. *G. Powell.* 8 T. R. 639

4. Where the words of a charter are doubtful, they may be explained by contemporaneous usage. *Blankley* v. *Winstanley*, 3 T. R. 279; *Gape* v. *Handley M.* 17 *G.* 3. 3 T. R. 288, *n.* and see 4 T. R. 821. and 4 E. R. 338

5. *Qu.* Whether usage *may be pleaded* to assist the court in the construction of a doubtful charter? *R.* v. *Bellringer*, 4 T. R. 821: *R.* v. *Miller.* 6 T. R. 268

6. A charter, directing an election to be made by the remaining members of a definite body of a corporation, is good in law. *R.* v. *S. Hoyte.* 6 T. R. 430

7. In a prescriptive corporation, an usage to this effect is evidence of such a charter. 6 T. R. 430

8. Consequently, in either case a person is well elected by a majority of the subsisting members as distinguished from a majority of the full body. 6 T. R. 430

9. The constitution of a corporation, as settled by act of parliament, cannot be varied by the acceptance of any charter inconsistent with it. *R.* v. *Miller.* 6 T. R. 268

10. A charter granting jurisdiction to borough magistrates over a district not within the borough, does not exclude the county justices without express words. *Blankley* v. *Winstanley.* 3 T. R. 279

11. And though such charter contain words of reference to former charters in which exclusive jurisdiction is given to the borough justices within the borough, and add that they shall have jurisdiction within the new district in *tam ampli modo & forma*, &c., yet if there be in the latter charter a saving clause of the rights of the crown, and of all other persons, the borough justices have only a concurrent jurisdiction with the county magistrates. 3 T. R. 279

12. The jurisdiction of county justices can only be taken away by *express words.* 3 T. R. 279

13. *Semble* that a corporation cannot make a fraternity. *R.* v. *Coopers' Company of Newcastle-upon-Tyne.* 7 T. R. 548.

III. *Dissolution and Revival.*

1. A judgment of seizure *quousque*, &c. against a corporation, in default of appearance, operates as a final judgment to dissolve the corporation, if they do not appear in the same term, or the next at farthest. *R.* v. *Avery.* 2 T. R. 515 to 569

2. The only use of a final judgment in such a case is to shew the crown's election to take advantage of the forfeiture: but any other matter of record, shewing the election, may equally answer the purpose. 2 T. R. 568

3. Therefore a new charter of incorporation granted after that time to a new body of men in the same place is good, notwithstanding a charter of restitution be afterwards granted to the old corporation: and such charter of restitution is absolutely void. 2 T. R. 568

4. A power reserved to the crown in a charter of incorporation to amove, by order of council, *one or more* of the corporators, which charter also declared that *all or any of them* so amoved should actually and without further process be amoved, and which also provided at the same time that upon such amotion the remaining corporators might proceed to fill up the vacancies, cannot be exercised to such an extent as not to leave a sufficient number to make a re election; and therefore an amoval of all is illegal and void. 2 T. R. 568

[This case was reversed in the House of Lords *April* 20, 1790. See 4 T. R. 122.]

5. When an integral part of a corporation is gone, and the corporation has no power to restore it, or to do any corporate act, the corporation is so far dissolved that the crown may grant a new charter. *R.* v. *J. Pasmore.* 3 T. R. 199

6. The major part of an integral part of the corporation whose attendance is required at the election of officers being gone, it operates as a dissolution of the whole corporation, which has thereby lost the power of holding corporate assemblies for the purpose of filling up vacancies and continuing itself. *R.* v. *Stewart*, *R.* v. *Morris.* 3 E. R. 213

7. Therefore where the election of mayor was to be made by the majority of an assembly composed of several integral definite parts of a corporation, and other burgesses and inhabitants *for the*

time being: held that one of such definite integral parts, being reduced below a majority of its proper number, could no longer be represented in such corporate assembly; and the whole corporation was thereby dissolved, being no longer capable of continuing itself. *R.* v. *Morris*, *R.* v. *Steward*. 4 E. R. 17

8. The proclamation of *James* II. in the fourth year of his reign, for restoring corporations to their ancient charters, &c. operates (when accepted) as a grant of revival to such of the old corporations as had surrendered their corporate franchises to *Charles* II. (but which surrenders were not enrolled) who had granted new charters; and overturns such new charters.

Newling v. *Francis*. 3 T. R. 189

9. The corporation of *Cambridge* did accept and act under that proclamation. 3 T. R. 182

IV. *Officers; their Qualification, Election, &c.*

1. When the mode of electing officers is not regulated by charter or prescription, the corporation may make bye-laws to regulate the election. 3 T. R. 189

2. Where a charter required that the mayor and common clerk for the time being, *and the common council for the time being, or the major part of them* should elect corporate officers, and directed that the common council should consist of 36; it was held that a majority of the whole number must meet to form an elective assembly; and that, if the corporation be reduced to a smaller number than a majority of the whole, no election of officers can be had. *R.* v. *Bellringer*. 4 T. R. 810

3. But where a corporation consists of an indefinite number, a major part of the existing body are competent to elect, and do other corporate acts. 4 T. R. 822

4. Where an integral part of a corporation composed of a definite number is required to vote at an election of a corporate officer, a majority of such integral definite part must attend, otherwise there can be no elective assembly: although other parts of the corporation also join in such election, and a majority of the whole existing body actually attend; but a majority of those present, when legally assembled, will bind the rest. 6 T. R. 268

5. If a presiding officer, who by the constitution of the borough forms an integral part of an elective assembly, depart from it after the meeting has been regularly formed and the election entered upon, but before it is completed, an election made after his departure is void. *R.* v. *Buller*. 8 E. R. 389

6. Where the *whole* corporation are summoned for a particular purpose (*e. g.* to receive the resignation of a common councilman) a *select body*, who are *all present and consenting*, may at the same meeting, without any particular summons to them for that purpose in their select capacity, proceed to an election of a common-councilman in the place of the other resigned, the power of election being in such select body, and the charter not requiring any previous summons.

R. v. *Theodorick*. 8 E. R. 543

7. A charter constitutes a corporation to consist of two bailiffs (senior and junior), twelve aldermen, and an indefinite number of burgesses; and after nominating the two first bailiffs, and directing the election of the first twelve aldermen, provides that on a certain day in the year, the *senior* bailiff shall be chosen by the bailiffs and aldermen, or the major part of them, *out of the aldermen*, for one year, and *until* another of the aldermen to that office in due manner should be *elected, perfected, and sworn*; and also provides for the election of the *junior* bailiff on the same day, *by a different mode of election* for one year, and *until*, &c. (as before); held that the *two bailiffs* do nor thereby constitute *one officer*, but two officers; and that the senior and junior bailiffs of different years *last legally appointed* (their respective successors *de facto* for several years having been ousted by *quo warrantos*), might coalesce together, and preside at a corporate meeting of the bailiffs and alderman for the election of a senior bailiff. And that the charter having directed the election of a *senior* bailiff to be made *of one of the aldermen*, must be taken to mean that there should be only *eleven* acting efficient aldermen apart from the senior bailiff, who was also an alderman; and consequently that *six* aldermen were a majority of that integral part, capable of making, together with the two last legal bailiffs, an elective assembly for the purpose of choosing a *senior* bailiff.

R. v. *Thornton*. 4 E. R. 294

8. Assuming that under the stat. 11 *G.* 1. *c.* 4. an election, begun at a corporate meeting, whereat the mayor presided, may be completed, in case of his absenting himself pending the proceedings, under the presidency of the next in place and order to him; yet where a question arose upon the right of a voter, on which the mayor as presiding officer decided by rejecting the vote; and thereupon, the remaining votes being equal, he declared the same, and that no election could be made; and thereupon ordered the meeting to be dissolved; and no objection was made at the time, nor any notice given to the electors present that any of them intended to proceed in the election notwithstanding the decision (which turned out to be erroneous); but after suffering the mayor and many of the freemen to depart, without notice, the rest who remained together proceeded to complete the election; the Court of K. B. held that such election was void even under the statute, as a surprize and fraud on the other electors. *R.* v. *Gaborian.* 11 E. R. 77

9. A charter granted to the mayor, bailiffs, and burgesses, or the greater part of them, to chuse *one of themselves* to be mayor; but the same charter appointed the first mayor to continue for a year, and until some *other burgess* should be elected and sworn, and the two first bailiffs to continue until *two other burgesses* should be elected and sworn; and it also directed the new mayor to be sworn in before the *last* mayor, *his predecessor*, and the bailiffs for the time being, and the burgesses present; and in like manner the new bailiffs to be sworn in before the mayor and the *last* bailiffs and the burgesses present. These latter provisions explain the first, and shew that the mayor must be chosen *out of the burgesses at large*, and not out of *the bailiffs*; and this avoids any question as to the validity of a *swearing in* of an officer *before himself* by his name of office.

R. v. *Harper.* 5 E. R. 208

10. Where a charter granted to the mayor and commonalty that "any alderman being wanted, the rest of the *aldermen might nominate* two *burgesses*, for the choosing of one of them as alderman by the *commonalty (per communitatem)*: held that *commonalty* included the whole corporation, and that an alderman so elected by the votes of the other aldermen, as well as the burgesses at large, was properly elected.

4 E. R. 327

11. Where a power of creating freemen is shewn to have been once vested in the body at large of a prescriptive corporation, the exercise of it cannot be sustained in a select part of the same corporation continued by charters under other names of incorporation: there being no express grant of such a power to the select body by any such charters, nor even any bye-law to that effect; even supposing such a power could be transferred by a bye-law from the whole to a part of the same corporation; although it be stated in the plea and admitted by the demurrer, that the same power which was immemorially exercised by the whole body down to the period of the granting and acceptance of the charters of *James* I. and *Charles* II. had been since those charters, &c. continually exercised by the select body in question; and although such charters contained a confirmation of all former privileges, &c. under whatever names of incorporation theretofore enjoyed.

Rex v *Holland.* 2 E. R. 70

12. A corporate office does not become *ipso facto* vacant by the non-residence of the corporator.

R. v. *J. Heaven.* 2 T. R. 772

13. It may be a cause of forfeiture; but the corporator does not lose his franchise, till a sentence of amotion by the corporation has been pronounced.

2 T. R. 772

14. And the Court of *B. R.* will not grant an information in nature of a *quo warranto* against him, until he has been amoved by the corporation.

2 T. R. 772

15. Where residence in a borough town is a necessary qualification in a candidate for an office, it is immaterial how long the party has been resident, if the residence has been *bonâ fide*.

R. v. *J. Sarjent.* 5 T. R. 466

16. Therefore where the defendant, having prior connexons with a borough-town previous to his being elected to the office of bailiff, for which previous residence is a necessary qualification, took a house at first for four years, but afterwards at his landlord's request for one, and slept there only one night before the election, and did not return

again for near a month afterwards, when he stayed two days. but retained possession of his house under his lease the whole time; as the taking of the house appeared to the court to be *bona fide*, that was held, on a rule for a *quo warranto* information, a sufficient legal residence to satisfy the qualification required. 5 T. R. 566

17. A jurat of the corporation of *Hastings* may be elected town-clerk of that corporation.

Milward v. *Thatcher*. 2 T. R. 81

18. But the two offices are incompatible; and the acceptance of the latter, though an inferior office, will vacate the former.

(See OFFICER.). 2 T. R. 81

19. The offices of town clerk and alderman are not necessarily incompatible.

R. v. *W. Pateman*. 2 T. R. 777

20. But where the town clerk's accounts are allowed by the aldermen, or where a town-clerk acts ministerially under the aldermen, who are judicial officers, the offices are incompatible: and the appointment to the former office is equivalent to an amotion by the corporation from the latter office. 2 T. R. 777

21. And if the person so appointed continue to exercise the office of alderman, a *quo warranto* information will be granted against him. 2 T. R. 777

22. The stat. 15 *Car.* 2. *c.* 17. creating the corporation of the *Bedford* Level, directs, that *they* shall appoint a *registrar*, &c. and *other officers* at their pleasure; the duty of which registrar is to register titles to land within the Level, and he takes an oath of office: and the corporation having *at the request of the registrar*, elected a *deputy registrar*, held 1st, that the latter officer must be considered as much a *deputy* of the *principal registrar*, as if nominated by him; 2dly, that however such deputy were properly or not constituted in the first instance, yet his authority necessarily expired on the death of his principal; 3dly, that however the acts of a legal deputy to a ministerial officer may be good after the death of his principal, before notice thereof to those who are interested in his acts, as being done under a colour of authority, yet that the titles of landowners within the Level, registered by the deputy *after the death of his principal was known*, were invalid: 4thly, that, the persons whose titles were so illegally registered had no authority under the act of parliament, to vote at the election of a new registrar. *R.* v. *Bedford Level Corporation*. 6 E. R. 356

23. A borough having first received a recorder by a charter of *Car.* 1. a subsequent charter of *Car.* 2. after nominating *J. S.* to be the first and modern recorder under that charter declared that it should be lawful for him the aforesaid *J. S.* to nominate a deputy; the court of K. B. held that this did not extend the power of appointing a deputy to the *successors* of *J. S.* in the office of recorder.

R. v. *St. Alban's Mayor*. 12 E. R. 559

24. The charter of *Saltash* empowers the mayor, justice of the peace, and the rest of the aldermen (seven in all), or the major part of them, of whom the mayor and justice to be two, when it shall seem to them *convenient and necessary*, to elect as many free burgesses as shall please them, *and to the same free burgesses so elected to administer an oath, &c.* The defendant was elected a free burgess in *October* 1804, and in *December* 1806, at a meeting of six out of the seven aldermen, in consequence of a mandamus to them to fill up the vacant place of alderman, and which meeting the mayor said was held for that sole purpose, the defendant tendered himself to be sworn in; against which 3 aldermen protested, one of whom immediately left the assembly; but before the other two protestors withdrew, the mayor, with the assent of two other aldermen, administered the oath of office to the defendant. The Court of K. B. held;

1st, That the swearing in of the burgess might well be at a time subsequent to the election; he having had a present legal capacity to be sworn in at the time of his election; and therefore not like the case of an infant elected.

2dly, That the act of swearing in, being merely ministerial, may be done by the mayor, as presiding officer, in the presence of the majority of the mayor and aldermen, by whom such act was required to be done, whensoever and howsoever, assembled, and without any previous summon for this purpose; there being no dissent by the majority at the time when the oath was so administered: and,

3dly, Though three, an equal number of those first assembled, protested against the defendant's being sworn in when he first tendered himself to take the oath; yet one of the protestors having withdrawn it was competent to the majority who remained to administer the oath, no vote having been come to by the major part at first assembled to preclude the body from doing the act at that meeting.

R. v. *Courtenay.* 9 E. R. 246

25. But where the new mayor of *New Romney* was required by charter to be sworn in *before* the old mayor, a swearing in by the town clerk, the usual officer to administer the oath, *before* the old mayor, but against the consent and direction of the latter, was held void. *R.* v. *Ellis.* 9 E. R. 212

V. *Actions and Proceedings by and against.*

1. The stat. *Geo.* 1. *c.* 4. was passed in order to secure the tranquillity of corporations, and to quiet possession. And the court are bound to guard their peace. *R.* v. *Stacey.* 1 T. R. 3

2. The court will not grant a criminal information against the members of a corporation for a misapplication of the corporation money; but it is rather a subject for an application to the court of Chancery. *R.* v. *Watson.* 2 T. R. 199

3. An order made by a corporation and entered in their books, stating that *A. B.*, (against whom a jury had found a verdict with large damages in an action for a malicious prosecution for perjury, which verdict had been confirmed in *C. B.*) was actuated by motives of public justice, &c. in preferring the indictment, is such a libel reflecting on the administration of justice for which the court will grant an information against the members making that order. 2 T. R. 199

4. Where by the constitution of a corporation, a person having served a seven years apprenticeship to a freeman residing in the town, is entitled to his freedom, and where, by a bye-law the indentures must be enrolled by the town-clerk within a certain time, an apprentice who is bound to a freeman, resident only occasionally, and whose service is to be performed at another place, is not entitled to have his indentures inrolled; nor will the court grant a *mandamus* to the town-clerk for that purpose.

R. v. *Marshall.* 2 T. R. 2

5. An ejectment against the bailiffs *pro tempore* of a corporation cannot be maintained by proving payment of rent for the premises by the annual predecessors of the defendants in the same office for several years before, and service of the notice to quit on the defendants, the existing bailiffs: for the payment of such rent by the bailiffs in succession is merely evidence of a tenancy in the corporation. But at any rate such tenancy may be determined by a notice to the corporation to quit, served on its officers: after which, the owner of the premises may distrain the cattle of any persons trespassing on his ground, or bring his action against them, or maintain ejectment against any person in the actual possession of the premises.

Doe v. *Woodman.* 8 E. R. 228

6. Where a corporation declaring in covenant by their modern name, stated that the citizens, &c. were from time immemorial incorporated by divers names of incorporation, and at the time of making the indenture by *A. B.* declared on were known by a certain other name, by which name *A. B.* granted to them a certain watercourse, and covenanted for quiet enjoyment: the Court of K. B. held that the deed granting the watercourse to them by such name was evidence as against the defendants, who claimed under the grantor, that the corporation was known by that name at the time, upon an issue taken on that fact.

Carlisle (Mayor, &c.) v. *Blamire.* 8 E. R. 487

7. Though the affixing of the common seal to the deed of conveyance of a corporation be sufficient to pass the estate, without a formal delivery, if done with that intent; yet it has no such effect if the order for affixing the seal be accompanied with a direction to their clerk to retain the conveyance in his hands till accounts were adjusted with the purchaser.

Derby Canal v. *Wilmot.* 9 E. R. 360

8. By indenture between *A. B.* and *C.* bailiffs, and *D. E.* and *F.*, aldermen, with the assent of the burgesses of the borough of *M.* of the one part, and *J. S.* of the other part; the said bailiffs, aldermen, and burgesses, demised lands to *J. S.* for years, to be holden of the said bailiffs, aldermen, and burgesses; and the deed was executed by *A. B.* and *C. D. E.* and *F.*; but not

sealed with the corporation seal; *J. S.* having paid rent to the bailiffs as chief officers of the borough, the Court of C. P. held that their servant might make cognizance for taking a distress under a demise by the corporation, notwithstanding a notice had been given by the aldermen (one of whom was a party to the indenture), to pay the rent to them; for the payment of rent to the bailiffs admitted a tenancy from year to year under the corporation.

Wood v. *Tate*, 2 N. R. 247

COSTS.

I. *Damages: where costs shall be governed by: and of the certificate of the Judge.*

1. The plaintiff is entitled to no more costs than damages in trespass for an assault, battery, *and tearing the plaintiff's cloaths*, if the jury find that the tearing was *in consequence* of the beating, and give less than 40*s.* damages.

Cotterill v. *Tolly*. 1 T. R. 655

2. If plaintiff recover less than 40*s.* damages on a count, alleging that the defendant assaulted him, "and then and there tore the plaintiff's cloaths, which the plaintiff then and there wore, &c." he is entitled to no more costs than damages.

Mears v. *Greenaway*. 1 H. B. 291
Lockwood v. *Stannard*. 5 T. R. 482

3. In trespass for an assault and battery where the defendant justifies the assault only, and the plaintiff obtains damages under 40*s.* and the judge does not certify, the plaintiff is entitled to no more costs than damages.

Page v. *Creed*. 3 T. R. 391
S.P. *Brennard* v. *Redmond*. 1 W. P. T. 16

4. But if to an action for an assault and battery the defendant plead the general issue and a justification *to the whole*, and the plaintiff obtain a verdict with damages under 40*s.*, the plaintiff is entitled to full costs.

Smith v. *Edge*. 6 T. R. 562

5. If one count state an assault on a man, and an assault on the horse which he is riding, and the jury give a verdict with general damages under 40*s.*, the plaintiff shall have no more costs than damages.

Bannister v. *Fisher*. 1 W. P. T. 357

6. In an action for assault, battery, and false imprisonment, if the verdict be for one shilling, and the judge certify under 43 *Eliz. c.* 6. the plaintiff will be deprived of his costs, though a battery was proved at the trial.

Wiffin v. *Kincard*. 2 N. R. 471

7. Where to an action of trespass for breaking and entering the plaintiff's close, &c. the defendant pleads a special plea of justification to the whole declaration; and the verdict is against him, the plaintiff is entitled to full costs, although the damages are less than 40*s.* and the judge at the trial does not certify.

Redridge v. *Palmer*. 2 H. B. 2
S. P. *Comer* v. *Baker*. 2 H. B. 342

8. *Aliter* in an action for slander.

Halford v. *Smith* 4 E. R. 567

9. Where in an action for slander, some of the counts in the declaration are for actionable words, and special damage is laid, referring to all the counts, and the plaintiff has a verdict on the whole declaration; though the damages recovered be less than 40*s.* he is entitled to full costs.

Savile v. *Jardine*. 2 H. B. 531

10. If the plaintiff in trespass *vi et armis* for beating his dog, recover less than 40*s.* the judge may certify under stat. 43 *Eliz. c.* 6 to prevent his recovering more costs than damages.

Dand v. *Sexton*. 3 T. R. 37

11. If it appear on the trial that the trespass however small, was committed after notice, and the jury give less than 40*s.* damages, the judge is bound under stat. 8 & 9 *W.* 3. *c.* 11. § 4. to certify that the trespass was wilful and malicious, in order to entitle the plaintiff to his full costs.

Reynolds v. *Edwards*. 6 T. R. 11

12. But in a subsequent case the court decided that it is discretionary in the judge to certify or not according as it appears to him, that the trespass was or was not *wilful and malicious*. And the judge having declined to certify in a case where notice was given by the wife of the plaintiff to the defendant not to enter the *locus in quo* in his cart, there being no road there; notwithstanding which the defendant persisted in going on for the purpose of viewing more conveniently the turning in of some cattle in assertion of a disputed right of common in an adjoining inclosure of the plaintiff's, which right was found for the defendant, on a justification pleaded; the court refused to interfere.

Good v. *Watkins*. 3 E. R. 495

13. Where a statute prohibits an act, and gives damages for the violation, with costs of suit, it does not take away the judge's power to certify, under 43 *Eliz. c.* 6. that the costs are less than 40*s.* *Williams* v. *Miller.* 1 W.P.T.400

14. In trespass for throwing stones, &c. at the plaintiff's windows belonging to his dwelling-house, and breaking the glass, &c. if the plaintiff recover less than 40*s.* he is entitled to no more costs than damages, unless the judge certify that the title to the house came in question.

Adlem v. *Grinaway.* 6 T. R. 281

15. In trespass *quare clausum fregit* if the defendant plead not guilty and a justification which does not make title to the land, upon which issues are joined which are found for the plaintiff with damages under 40*s.*, still the plaintiff is entitled to full costs.

Peddell v. *Kiddle.* 7 T. R. 659

15. Where in trespass *quare cl. fr.* the defendant pleads not guilty, and a justification of a right of way, and the plaintiff traverses the right of way, and new assigns *extra viam*; and there is a verdict for the plaintiff with 1*s.* damages on the new assignment, and for the defendant on the justification; the plaintiff is entitled to full costs, deducting the defendant's costs on the issue found for him.

Martin v. *Valance.* 1 E. R. 350

16. If there be a certificate against any more costs than damages upon the stat. 43 *Eliz. c.* 6. § 2., the plaintiff shall not have the costs of the double pleas, on which all the issues were found for him: although the Judge have not certified under the stat. 4 *Ann. c.* 16. § 5. that the defendant had probable cause to plead the several special matters; that section, which says that "if a verdict be found on any issue for the plaintiff costs shall be given, &c. unless the Judge who tried the said issue shall certify," &c. only applying to cases where one at least of the special pleas is found for the defendant, which would entitle him to the general costs.

Richmond v. *Johnson.* 7 E. R. 583

17. If the plaintiff in an action for mesne profits recover less than 40*s.*, and the judge do not certify that the title came in question, the plaintiff is entitled to no more costs than damages.

Doe v. *Davies.* 6 T. R. 593

18. Where to trespass at *A.*, and throwing down, &c. plaintiff's hedge *there then erected, &c.* to which defendant pleads the general issue, and justifies the throwing down, because it was erected on a common over which he prescribes for a right of common, and issue is taken on such right which is found for defendant, and a verdict for plaintiff with 20*s.* damages on the general issue and the judge did not certify, the plaintiff is entitled to no more costs than damages, because the right to the freehold *might* have come in question.

Stead v. *Gamble.* 7 E. R. 325

19. If in an action on the case for an injury done to the plaintiff's right of common by digging turves there, the Judge certify under the stat. 43 *Eliz. c.* 6. § 2. that the damage did not amount to 40*s.*, the plaintiff shall not have costs; for the *interest or title of the land* does not *necessarily* come in question in such action, and did not in fact in this case where an action was brought by one commoner against another for a mere wrongful act.

Edmondson v. *Edmondson.* 8 E.R.294

20. A judge's certificate that a custom-house officer 'had probable cause for seizing goods' does not extend to injuries accompanying such seizure, so as to prevent the plaintiff from recovering damages and costs under statutes 23 *G.* 3. *c.* 70. § 29; and 26 *G.* 3. *c.* 40. § 31.

Baldwin v. *Tankard & al.* 1 H.B. 28

21. Where a cause has been referred by a rule at *nisi prius*, and the costs directed to abide *the event*, that must be taken to mean the *legal event.*

Swinglehurst v. *Altham.* 3 T. R. 138

22. Where a verdict was taken for 10*l.* in trespass, subject to an award of damages, and the costs *to abide the event*; if the arbitrator find less than 40*l.* damages, the plaintiff cannot have his costs, though it be also found that the trespass was *wilful*, and *that the defendant should pay the plaintiff his costs*; for costs being directed to abide *the event*, means the *legal* event; and the authority of a judge to certify for costs under the stat. 22. & 23 *Car.* 2. *c.* 9., where the trespass is wilful is not transferred to the arbitrator under such a rule of reference.

Ward v. *Mallinder.* 5 E. R. 489

23. Therefore where trespass was brought for pulling down the plaintiff's gates

and assaulting him, and the defendants justified to all the counts (except one) under different rights of way, and pleaded not guilty to the whole, and under the above rule the arbitrator awarded a right of way to the defendants different from any of those pleaded, and gave 5*s*. damages to the plaintiff for the assault, as having been committed when the defendants were attempting to exercise the right of way negatived by the arbitrator, the plaintiff can recover no more costs than damages; for the arbitrator's award is not tantamount to a judge's certificate under stat. 32 and 23 *Car.* 2. *c.* 9.
3 T. R. 138

24. The plaintiff, in trespass for breaking his close, who recovers less than 40*s*. is not entitled to costs of increase merely because a view was granted before trial, though upon the application of the defendant. *Flint* v. *Hill*. 11 E.R.184

II. *Executors; where they shall be liable to Costs.*

1. It seems that where the executor may bring the action in his own right, he ought to pay costs if he fail.
5 T. R. 234

2. If a plaintiff name himself executor when he need not, and fail, he shall pay costs; as where his declaration states a cause of action due to him personally. 4 T. R. 277

3. If money when recovered would be assets in the hands of an executor, the executor suing as such, is not liable to costs. *Thompson* v. *Stent*. 1 W.P.T.322

4. If an executor or administrator bring trover, stating the conversion after the testator's or intestate's death, and fail, he must pay the costs.
Bellard v. *Spencer*. 7 T. R. 358

5. Administrators declaring in trover on a possession of the goods by their intestate, and a conversion in their own time, and being nonsuited, are liable to costs; for the fact of their possession is immaterial, and they may sue in their own right.
Hollis v. *Smith*. 10 E. R. 293

6. But if an executor declare on a trover and conversion in the testator's lifetime, and also on a trover and conversion after his death, the evidence offered being only applicable to the first count; and he be nonsuited, he is not liable to pay costs.
Cockerill & Ux., Executrix, v. *Kynaston*. 4 T. R. 277

7. Where an executor sued on a policy of insurance effected by his testator for himself and two others then living, and was nonsuited, the Court of C. P. held, the executor should not pay costs though the action might have been brought by the two surviving parties alone. *Wilton, Executrix* v. *Hamilton*.
1 B. & P. 445

8. Where a plaintiff sued as administratrix in covenant on a breach, subsequent to the death of her intestate, and had judgment against her on demurrer; held that she was not liable to costs.
Tattersall v. *Groote*. 2 B. & P. 253

9. Where the plaintiffs sued as executors in covenant against the lessor of their testator, for not providing timber for the repair of the demised premises, upon a demand made by the plaintiffs after the death of their testator; held that they were not liable to pay the costs of a judgment as in case of a nonsuit; inasmuch as though the breach happened in their own time, they could only declare as executors upon the contract made with their testator. *Cooke* v. *Lucas*. 2 E. R. 395

8. On a review of all the cases, the sound doctrine seems to be, that if the executor or administrator must sue as such on the contract made with the testator or intestate, he is not liable to costs, though the cause of action arose after the death of the testator or intestate. 2 B. & P. 255. 2 E. R. 398

11. And perhaps the sound principle on which the exemption of executors and administrators rests, is not the degree of ignorance under which they may be supposed to be, but the description in the stat. 23 *H.* 8. *c.* 15. of the actions in which costs are to be paid; namely, "upon any especialty made *to the plaintiff*, or any contract supposed to be made between *the plaintiff* and any other person." 2 B. & P. 255

12. If an executor sue as such for money received by the defendant since the testator's death to the plaintiff's use, and fail, he is liable to pay costs.
Goldthwayte v. *Petrie*. 5 T. R. 234

13 So if they improperly lend their names to other persons. 3 B & P. 115

14. Therefore where plaintiff sued as administrator upon a contract made with his intestate, and assigned by the plaintiff to *J. S.* for whose benefit the action was brought; it appearing that the contract had been annulled, with the

privity both of the plaintiff and *J. S.*, and that the former was indemnified by the latter, and a verdict being found for the defendant; the court made an order for the plaintiff to pay the costs.
Comber v. *Hardcastle*. 3 B. & P. 115

15. Executors and administrators are liable to pay the costs of a non-pross.
Higgs v. *Warry*. 6 T. R. 654

16. But they are not liable to costs on judgment as in case of a nonsuit under stat. 15 *G.* 2. *c.* 17.
Booth & al. v. *Holt*. 2 H. B. 277

17. But when an executor adds one count as executor, stating a cause of action for which he might declare in his own right, if he is nonsuited he shall be liable to costs.
Grimstead v. *Shirley*. 2 W. P. T. 116

18. Executors and administrators are liable to *costs in error* in cases where they would be liable in the original action. *Williams & al. Executors* v. *Riley, in Cam. Scac.* 1 H. B. 566

19. Where the defendant pleads the general plea of bankruptcy to an action brought by an *executor or administrator*, and obtain a verdict, the plaintiff is *not liable to costs* under 5 *G.* 2. *c.* 30. § 7.
Martin & Ux. v. *Norfolk*. 1 H. B. 528

20. No costs can be awarded on prohibition against executors, against whom judgment was obtained on demurrer, upon a question, Whether they were entitled to a *general* or *limited* probate?
Samuel v. *Wilkinson*. 3 E. R. 202

21. An executor having pleaded *non assumpsit* as well as *plene administravit* and *plene administravit præter, &c.*, and thereby forced the plaintiff to go to trial; the plaintiff obtaining a verdict on the non-assumpsit and being entitled to judgment of assets *quando acciderint*, is entitled to the general costs of the trial though the issue of *plene administravit* is found for the defendant. *Hindsley* v. *Russell*. 12 E. R. 232

22. The plaintiffs as executors having sued one of the co-obligors on a joint and several bond in K. B. to which usury was pleaded, suffered a nonsuit, and brought a second action against another co-obligor in C. B., in which the case having gone off *pro defectu juratorum*, they brought a third action against all three co-obligors, in order to exclude the evidence of one upon the usury, and moved to discontinue the second action, without costs; but the court only allowed them to discontinue on payment of costs.
Melhuish & al. v. *Maunder*. 2 N. R. 72

III. *Feigned Issue.*

On a feigned issue costs follow the verdict: but *qu.* when the court permits parties to try a feigned issue, whether they will not compel them to consent that the costs shall be in the discretion of the court?
Hoskins v. *Lord Berkeley*. 4 T. R. 402

IV. *Former Actions or Trial, Costs of when to be paid.*

1. After a nonsuit in trespass, the Court of K. B. stayed proceedings in a second action between the same parties for the same cause until the costs of the nonsuit were paid, notwithstanding the plaintiff was a prisoner at the time of bringing the second action, and sued in *formâ pauperis*.
Weston v. *Withers*. 2 T. R. 511

2. So where the plaintiff was nonsuited in an action on the statute of bribery, that court stayed proceedings, in a second action for the same cause between the same parties, till the costs of the first were paid.
Boulton q. t. v. *Bingham*. 2 T. R. 511, *n.*

3. The like in the case of an action for a malicious prosecution.
Baldwin v. *Richards*. 2 T. R. 511, *n.*

4. The Court of C. P. refused to stay proceedings against a defendant till *the debts and costs* recovered *by him* in a former action against the plaintiff were paid: saying they could not try the merits of the cause, on motion.
Cooke v. *Dobree*. 1 H. B. 10

5. If the defendant in a former ejectment, who was then evicted, bring another ejectment for the same premises, the court will stay the proceedings until he pay the costs of the former cause.
Thrustout d. Williams v. *Holdfast*. 6 T. R. 223

6. Ejectment in *C. B.* and verdict for the plaintiff, and costs paid by the defendant, who then brought an ejectment in *K. B.* for the same premises and recovered, but was not paid his costs; and a third ejectment being commenced in *C. B.* by the plaintiff in the first ejectment, the court stayed proceedings till payment of the costs of the second ejectment in *K. B.*
Doe d. Walker v. *Stevenson*. 3 B. & P. 22

7. So the court will stay the proceedings in a second ejectment until the

costs of a nonsuit in a former ejectment be paid, if it be brought on the same title, though it be brought for different lands in a different county, and though all the defendants be not the same. *Keene d. Angel* v. *Angel.* (See *post* VIII. 17.) 6 T. R. 740

8. So proceedings in ejectment were stayed till the costs of a former ejectment brought by the father of the lessor of the plaintiff, against the defendant's father on the same title were paid. *Doe d. Feldon* v. *Roe.* 8 T. R. 645

9. So till the costs of a former ejectment for the same premises, and also of an action for mesne profits, were paid.

Doe d. Pinchard v. *Roe.* 4 E. R. 585

10. Where a verdict was found for the plaintiff subject to a case reserved, from the insufficient state of which, it was necessary for the cause to be sent down to a second trial, and nothing was said respecting the costs, though the plaintiff succeeded on such second trial, the Court of K. B. held that he was not entitled to the costs of the first.

Hankey v. *Smith.* 3 T. R. 507

S. P. determined in *Smith* v. *Haile.* 6 T. R. 71

11. But where the defendant in such a case gave the plaintiff a *cognovit*, without going to trial a second time, he was liable to pay the costs of the former trial.

Booth v. *Atherton.* 6 T. R. 144

13. After verdict for the defendant, and a new trial awarded upon a question of law, without any thing said as to costs; and instead of proceeding to a second trial, the parties agree to state the facts specially, as if on a case reserved at the trial; on which the postea is afterwards delivered to the plaintiffs; they are entitled to the costs of the first trial.

Robertson v. *Liddell.* 10 E. R. 416

13. The Court of C. P. held that where a cause having been once tried, a new trial was granted, at which a juror was withdrawn, on the party, who gained the verdict on the first trial, undertaking generally *to pay the other his costs;* such an undertaking included only the costs of the second trial.

Rouse v. *Bardin & al.* 1 H. B. 639

14. That court also held, that where a cause is twice tried, and the verdict is found on each trial for the same party, he is entitled to the costs of both; but where the verdicts are found for different parties, the costs of the first trial are not allowed.

Trelawney v. *Thomas.* 1 H. B. 641

15. And the Court of K. B. assented to this; and held that when upon setting aside a nonsuit the costs are directed to abide the event, though the plaintiff succeed on the second trial, he is not entitled to the costs of the first; neither is the defendant in such case entitled to the costs of the first trial.

Austen v. *Gibbs.* 8 T. R. 619

16. Plaintiff having obtained a verdict, the court granted a new trial, directing that the "costs of the former trial should abide the event of the new trial." On the second trial the verdict was for the defendant. The Court of C. P. held that the defendant was only entitled to the costs of the second trial. *Chapman* v. *Partridge.* 2 N. R. 382

17. After a *venire de novo* awarded upon an imperfect special verdict, and a new trial granted after a verdict for the plaintiff on the second trial, and the jury find again for the plaintiff on the third trial, he is only entitled to the costs of the last trial, unless it be otherwise expressed in the rule granting the new trial.

Bird v. *Appleton.* 1 E. R. 111

18. Where the plaintiff withdraws the record after the cause is called on for trial, the court will make it a condition of discharging a rule for judgment as in case of a nonsuit, that he shall pay the defendant the costs of the day occasioned by not countermanding notice of trial: though the practice of the court is not to grant a rule for costs for not going on to trial, and a rule for judgment as in case of a nonsuit, at the same time.

Jordaine v. *Sharpe.* 2 H. B. 280

19. Where a *venire de novo* is awarded, the party succeeding is only entitled to the costs of the second trial.

Lickbarrow v. *Mason.* 6 T. R. 131

20. A bill of exceptions, being no part of the record in the court below till after judgment, is not to be included in the taxation of costs there.

Gardner v. *Baillie.* 1 B. & P. 32

V. *Juror withdrawing.*

[*and see post* VII. 2.]

1. Wherever a juror is withdrawn, each party must pay his own costs.

3 T. R. 657

VI. *Where there are several Counts; several Defendants; or various Issues.*

1. If there be two defendants in an action of assumpsit, one of whom suffers judgment by default, and the other obtains a verdict, he who obtains the verdict is entitled to costs.

Shrubb v. *Barratt.* 2 H. B. 28

2. If the plaintiff take issue on several pleas, one of which is insufficient in law, and has a verdict on all the issues except that joined on the insufficient plea, which is found for the defendant, and afterwards judgment is entered up for the plaintiff, still he shall not be allowed any costs on the issue found for the defendant.

Kirk v. *Nowill & al.* 1 T. R. 266

3. If an avowant in replevin after trial and verdict for the plaintiff obtain judgment *non obstante veredicto*, in consequence of the plaintiff's pleas in bar being bad, he is not entitled to any costs on the pleadings subsequent to the pleas in bar, because he should have demurred to them.

Da Costa v. *Clarke.* 2 B. & P. 376

4. And if judgment had been arrested in that case, no costs would have been given, *ib.*

5. If one of several pleas pleaded by defendant be adjudged bad on a demurrer to plaintiff's replication, the plaintiff is entitled to have the costs of those pleadings deducted from the costs taxed for the defendant upon the *postea*, if afterwards upon trial of the issues joined on the other pleas defendant should have a verdict, even though it should appear on the whole of the record that the plaintiff had no cause of action.

Duberley v. *Page.* 2 T. R. 391

6. If there be two distinct causes of action in two counts, and as to one the defendant suffers judgment by default, and as to the other takes issue and obtains a verdict, he is entitled to judgment for his costs on the latter count, notwithstanding the plaintiff is entitled to judgment and costs on the first count. *Day* v. *Hanks.* 3 T. R. 654

7. So, where in an action of trespass there was only one count, but several pleas of justification on which issue was taken: new assignment, as to which judgment by default: *venire* as well to assess the damages on the judgment by default as to try the issues: all the issues found for the defendant; held that the defendant was entitled to the cost in those issues.

Griffiths v. *Davies.* 8 T. R. 466

8. The authority of *Day* v. *Hanks*, recognized by the Court of C. P.—*Per Le Blanc* J. 8 T. R. 467

9. In C. P. if plaintiff obtain judgment upon one of several counts, he is entitled to the costs of the whole declaration. *Spicer* v. *Teasdale.* 2 B. & P. 49

10. But subsequently to this case the court declared that in future their practice should be conformable to that of K. B. upon this point. 2 B. & P. 334

11. Accordingly, in an action on a policy of insurance with a count for money had and received, where the defendant paid no money into court, but established as a defence that the risk never commenced, and the plaintiff obtained a verdict for the premium only: the court held that the plaintiff was only entitled to the costs of the count on which he succeeded, and so much of the expenses of the trial as were necessarily incurred by him in support of that count; and that neither party was entitled to the costs of the special count. *Penson* v. *Lee.* 2 B. & P. 330

12. Where in assumpsit the defendant pleaded the general issue, and the statute of limitations to the whole sum demanded, and as to part of it, that the promises were made by the defendant's testator and one *A. B. jointly*, which *A. B.* survived the other, and is still living; and this last issue was found at the trial for the defendant, and the other two issues for the plaintiff, who thereupon had judgment for the rest of his damages and costs; held, that the defendant was not entitled to have the costs of the issue found for him, deducted from the costs of the trial, which the plaintiff was entitled to on the issues found for him: *aliter* where all *the issues at the trial* are found for the defendant, but the plaintiff has judgment upon demurrer, and recovers damages on a writ of inquiry.

Postan v. *Stonaway.* 5 E. R. 261

13. Trespass for breaking and entering the plaintiff's free fishery in *A.*, and also in *B.*, and also in *A.* and *B.*; plea, 1. Not guilty. 2. That the said free fisheries were parcel of a navigable harbour, &c. common to all the king's subjects. Replication, prescribing for a free fishery in the said place in right of the plaintiff's

manor. Rejoinder, taking issue on such prescription. On verdict for the plaintiff on the general issue, and for the defendant on the prescription; the latter going to the whole declaration, the Court of K. B. held that the plaintiff was not entitled to costs.

Vivian v. *Blake.* 11 E. R. 263

14. Where some issues in replevin are found for the plaintiff which entitle him to judgment, and some for defendant, the defendant must be allowed the costs of the issues found for him out of the general costs of the verdict, unless the judge certify that the plaintiff had probable cause for pleading the matters on which those issues are joined.

Dodd v. *Joddrell.* 2 T. R. 235

15. And the defendant is entitled not only to the costs of the pleadings which form, but also of the trial of, those issues which are found in his favour. *Brooke* v. *Willet.* 2 H. B. 435

Vellum v. *Simpson.* 2 B. & P. 368

16. The statute of *Ann.* being remedial ought to be so construed as to advance the remedy: and the construction adopted in the preceding cases is analogous to that put upon the stat. of *Gloucester*, which, in terms, gives only the costs of the writ, but is held to give all the costs of the suit.

Heath J. 2 B. & P. 369

17. Where any one of several issues in a *quo warranto* information is found for the prosecutor, on which judgment of *ouster* is given, he is entitled to costs on all the issues.

R. v. *Downes.* 1 T. R. 453

18. Where a declaration in trespass consists of one count only, the defendant justifies part of it, and the plaintiff new assigns without taking issue on the special plea, and obtains a verdict, he is entitled to the costs of all the pleadings. *Gundry* v. *Sturt.* 1 T. R. 636

19. An inclosure act directed that the parties, where dissatisfied with the determination of the commissioners, might bring actions to try their rights, adding, "that if the verdict should be in favour of the commissioners' determination, the costs should be borne by the plaintiff; and if against such determination, then by the proprietors at large;" a proprietor brought an action, claiming nine distinct rights, and recovered for three only; it was held that he should only have his costs on those issues found for him, and that the defendant should have his costs of the other issues.

Braithwaite v. *Bradford.* 6 T. R. 599

VII. *On Payment of Money into Court.*

1. A plaintiff is entitled *(at any time before trial)* to all the costs till the time of the defendant's paying money into court, notwithstanding he afterwards proceeds in the action. *Hartley* v. *Bateson.* 1 T. R. 629; and *Griffiths* v. *Williams.* 1 T. R. 710

2. But if the defendant pay money into court, and the plaintiff proceed to trial, when a juror is withdrawn, the plaintiff is not entitled to the costs up to the time of paying money into court.

Stodhart v. *Johnson.* 3 T. R. 657

3. So if defendant pay money into court, and the plaintiff afterwards proceeds to trial, when a verdict is given against him; the latter is not entitled to the costs up to the time when the money was paid into court. *Stevenson* v. *Yorke*, and *Kabell* v. *Hudson.* 4 T. R. 10

4. But where the plaintiff having given notice of trial, neither entered his cause, nor countermanded the notice, but took the money out of court; he was allowed costs up to the time of the money being paid in, though the defendant, was entitled to judgment as in case of a nonsuit.

Seymour v. *Bridge.* 8 T. R. 408

5. And the same principle was held to apply, where the plaintiff twice carried the record down to trial and withdrew it. *Lorck* v. *Wright.* 8 T. R. 486

6. Where a defendant was holden to bail for a larger sum, and paid a lesser sum into court, which the plaintiff accepted and proceeded no further in the action, The Court of C. P. held the defendant entitled to his costs under 43 *G.* 3. *c.* 46 § 3.

Laidlaw v. *Cockburn, Bt.* 2 N. R. 76

7. The defendant in several actions on a policy of insurance paid money into court, which the plaintiff took out, without taking the costs at that time: afterwards they entered into the common consolidation rule, and the plaintiff was nonsuited in the action that was tried; ruled (by the Court of K. B.) that the plaintiff was not entitled to the costs in any of the actions up to the time of paying the money into court.

Burstall v. *Horner.* 7 T. R. 372

8. But in the Court of C. P. if the plaintiff proceed to trial after money

paid into court, and the verdict is against him; he is notwithstanding entitled to costs up to the time of the money paid in. *Wilton* v. *Place.* 2 B. & P. 56
And *Muller* v. *Hartshorne.* 3B.&P.556

8. If a defendant pay money into court upon some of the counts only, and the plaintiff take it out; the latter is only entitled to the costs of those counts. *Baillie* v. *Cazelet.* 4 T. R. 579
Skarrott v. *Vaughan.* 2 W. P. T. 266

9. In a special count on a policy, the risk was stated to continue until the ship was unladen, and there were common counts: held that the premium having been paid into court generally was an admission of the contract stated in the special count; and that it was not competent to the defendant to shew that the policy, by which the risk was originally made to cease after the ship was moored 24 hours in safety, was afterwards altered by the broker without the defendant's knowledge. But the defendant (having afterwards obtained a rule to amend the rule for paying money into court, by confining it to the money counts, and for a new trial on payment of costs, if the plaintiffs thereupon determine to take the money out of court, and not to proceed further), is entitled to all the costs of the action, and not merely to the usual costs of a new trial.
Andrews v. *Palsgrave.* 9 E. R. 325

10. When the defendant pays money into court, which the plaintiff agrees to accept, the latter must serve the defendant with notice of an appointment before the Master to tax the costs.
Kabell v. *Hudson.* 4 T. R. 10

11. Where after action commenced and before declaration, the defendant offered to pay the debt and costs, and the plaintiff refused to receive it, the court of C. P. allowed the defendant to pay into court the debt and costs up to the time of his offer: and compelled the plaintiff to pay the costs of the application and all costs subsequent to the offer. *Zeevin* v. *Cowell.* 2 W. P. T. 203

VIII. *Of Security and Recognisances for Costs; and of Costs on Interrogatories, &c.*

1. The Court of K. B stated that there were only three instances where the court will interfere to oblige the plaintiff to give security for costs; 1st, When an infant sues; in which case his *prochain ami* or guardian, or attorney, must give security. 2dly, When the plaintiff resides abroad. 3dly, Where there has been a former ejectment; in which case the court will stay proceedings in the second ejectment till the costs of the former are paid.
Doe d. Selby v. *Alston.* 1 T. R. 490, 1

2. The Court of C. P. refused to require the plaintiff, in a *qui tam* action, to give security for costs, though it appeared that he was insolvent.
Field q. t. v. *Carron.* 2 H. B. 27

3. Nor will the Court of C. P. compel security for costs in error on the ground of the plaintiff in error being a lunatic. *Steel* v. *Allan.* 2 B. & P. 437

4. If the plaintiff reside abroad, the Court (of K. B.) will stay proceedings till he give security for the costs.
Pray & al. v. *Edie.* 1 T. R. 267

5. And this is now the practice of the Court of C. P. See *Ganesford* v. *Levy,* 2 H. B. 118. overruling the former case of *Parquot* v. *Eling,* 1 H. B. 106. But see note (*b*) 2 H. B. 384. that the rule will be granted on terms, and at the discretion of the court.

6. So if the plaintiff reside in *Ireland.*
Fitzgerald v. *Whitmore.* 1 T. R. 362

7. But see now as to the practice of the Court of C. P. *Tullock* v. *Crowley.* 1 W. P. T. 18; in which case the Court of C. P. refused to oblige a plaintiff (an English subject, a prisoner in France) to give security for costs.

8. Where an action was brought without the knowledge of the plaintiff, who was out of the realm, the Court of C. P. required security for the costs to be given on the part of the plaintiff.
Ball v. *Adrian.* 1 W. P. T. 64

9. The court will not stay the proceedings till the plaintiff, a foreigner, give security for the costs, unless the defendant have put in bail. *De la Preuve* v. *the Duc de Biron.* 4 T. R. 697

10. After defendant has agreed to take short notice of trial. the court will not compel plaintiff, though a foreigner and resident abroad, to give security for costs. *Michel* v. *Pareski.* 2 H. B. 593

11. If a foreigner sue two defendants, and only one of them puts in bail, that one may require the plaintiff to give security for the costs, without putting in bail for the other defendant.
Carr v. *Shaw.* 6 T. R. 496

12. And if one of two plaintiffs reside within reach of the process of the court, security will not be required for the costs, though the other plaintiff be

a foreigner residing abroad, and though the first mentianed plaintiff be a bankrupt in execution for debt.

M'Connel & al. v. *Johnston.* 1 E.R.431

13. The court (after issue joined) made a rule on the plaintiff, who had left the kingdom, to give security for the costs.

Barker v. *Hargreaves.* 6 T. R. 597

14. An application to make the plaintiff, who resided abroad, give security for the costs refused, after notice of trial given; as the defendant might have applied earlier, after knowledge of the fact of the plaintiff's residence, and before so much of the costs were incurred. *Walters* v. *Frythall.* 5 E. R. 338

15. Where a foreign seaman had brought an action for his wages against a foreigner, the Court (of C. P. *dissent. Rooke*, J.) refused to compel the plaintiff to give security for costs, on account of his being on a voyage on board an *English* ship.

Henshen v. *Garres.* 2 H. B. 383

16. And that court refused a similar motion in an action *against an Englishman* by a foreign seaman, serving on board an *English* ship.

Jacobs v. *Stevenson.* 1 B. & P. 96

17. And also in an action by a prisoner of war for wages earned on board an *English* ship. *Maria* v. *Hall.* 2 B.&P. 236

18. The Court of C. P. refused to require security for costs of a foreigner, a captain of a ship, who was in the habit of sailing to and from the ports of this country. *Nelson* v. *Ogle.* 2W.P.T.253

19. The Court of K. B. required an uncertificated bankrupt, who brought trover for goods, to give security for costs in case he should fail.

Webb v. *Ward.* 7 T. R. 296

But the Court of C.P. refused to compel two plaintiffs, one of whom was a bankrupt and the other a prisoner in Newgate, to give security for costs.

Anonymous. 2 W. P. T. 61

20. Where the lessor of the plaintiff had abandoned his suit in another court, and brought a fresh ejectment in K.B., the court refused an application, requiring him to give security for the costs. *Doe d. Selby* v. *Alston.* (See *ante* IV. 7, 8.) 7 T. R. 491

21. On a defendant's acquittal on an information, he is not entitled under stat. 4 and 5 *W. & M. c.* 18. § 2. to costs, beyond the extent of the recognizance entered into by the prosecutor in 20*l.* under that act.

R. v. *Filewood.* 2 T. R. 145

22. But in that case (No. 20) the court intimated that in future it might be proper to adopt some new rule, such as refusing to grant any information, unless the prosecutor will undertake to pay all the costs. 2 T. R. 145

23. However, in a subsequent case they refused to make such a rule; and said that the court, on granting an information, would not require the prosecutor to give security for the costs, in case the defendant should be acquitted, beyond the extent of the recognizance in 20*l.* required by that statute of *W. & M.*

R. v. *R. Brooke.* 2 T. R. 190

24. If a sessions case be sent down to be re-stated, and the prosecutor abandon it when it is returned, this court will discharge his recognizance for the costs given under stat. 5 *G.* 2. *c.* 19. but if he dispute the amended order, they will not. *R.* v *Inhabitants of Edgeworth.* 4 T. R. 218

25. Under § 2. of the said stat. 5 *G.* 2. *c.* 19. the party removing a conviction into K. B. by *certiorari*, must enter into a recognizance with two sureties in the entire sum of 50*l.* *R.* v. *Bonghey*, 4 T. R. 281—*R.* v. *Dunn.* 8T. R. 217 (See CERTIORARI II. 7, 8.)

26. Whether the party removing a conviction by *certiorari*, under stat 5 *Ann.* c. 14. § 2. should give a bond to the prosecutor for payment of costs, &c.? *Qu.* 8 T. R. 217, 218, *n.*

27. If a defendant remove an indictment into K. B. by *certiorari*, giving the usual recognizance under stat. 5 *W. & M. c* 11. and be found guilty, and die before the day in bank, his bail are liable to pay the costs.

R. v. *Finmore.* 8 T. R. 409

28. The 12th sect. of the stat. 38 *Geo.* 3. c. 52, providing that no indictment shall be removed into the next adjoining county, *except the person applying for such removal* shall enter into a recognizance in 40*l.* for the extra costs, &c. does not relate to indictment sent by K B. to be tried in the next adjoining county after a removal thither by *certiorari*. *R.* v. *Nottingham.* 4 E. R. 208

29. The party succeeding is not entitled to the costs of examining witnesses on interrogatories, or taking office copies of depositions; but each party applying pays his own expense unless it be otherwise expressed in the rule.

Stephens v. *Crichton.* 2 E. R. 259

30. If a rule of court for the examination of witnesses by commission, express that the deposition of witnesses at *Hamburgh* and *Lubeck* are to be taken, and the commission is directed to persons at *Hamburgh*, the expenses of bringing witnesses from *Lubeck* to *Hamburgh* ought to be allowed upon taxation. *Muller* v. *Hartshorne*. 3 B. & P. 556

31. Where a party obtains leave, by consent, to examine witnesses abroad on depositions, he is not entitled to be allowed the expense of taking the depositions in the taxation of costs, though he succeed. *Taylor* v. *Royal Exchange Assurance Company*. 8 E. R. 393

IX. *By Statute.*

1. The statute of *Gloucester* gives costs, where damages are given by any subsequent statute. 1 T. R. 73

2. Wherever an action is given to the party grieved by an act since the stat. of *Gloucester*, he is entitled to costs if he succeed, though he had no remedy before such act. 7 T. R. 268

3. Costs are always given in actions on the statute of hue and cry, where damages are recovered. 1 T. R. 72

4. A party grieved by having his house set on fire, is entitled to costs in an action on stat. 9 *G.* 1. c. 22., against the hundred, although the costs, together with the damages, may exceed 200*l.* *Jackson* v. *Calesworth Inhabitants*. 1 T. R. 71

5. In trespass against the owner of a house adjoining to the plaintiff's in the metropolis, for taking down his party wall and building on it, the defendant shewing at the trial that he was authorised in doing the thing complained of under the building act 14 *G.* 3. c. 78. is entitled to treble costs under the 10th section, upon a non-suit. *Collins* v. *Poncy*. 9 E. R. 322

*5. A party grieved who recovered damages against the sheriff for not taking bail under stat. 23 *H.* 6. c. 9. is also entitled to costs. *Creswell* v. *Houghton*. 6 T. R. 355

6. A prisoner suing as a party grieved on the *habeas corpus* act, a copy of the warrant of commitment being refused him, having recovered the penalty, is entitled to costs. *Ward* v *Snell*. 1 H. B. 10

7. A person sued on stat. 25 *G.* 3. c. 50 for shooting without a certificate, is not entitled to treble costs on obtaining a verdict; they being only due where a person is sued for any thing done in putting the act into execution, and obtains a verdict. *Smith* v. *Wallis*. 1 T. R. 252

8. Where a defendant removes proceedings by a *recordari facias loquelam* from a county court into one of the superior courts, and signs judgment of *non pros.* in default of the plaintiff's appearing, he is entitled to costs by stat. 4 *Jac.* 1. c. 3. *Davis* v. *James*. 1 T. R. 372

9. A justice of the peace, who has prosecuted a gaoler to conviction for suffering a prisoner to escape, committed by him on a charge of felony, is not entitled to the costs of the conviction under stat. 5 & 6 *W.* & *M.* c. 11. § 3. *R.* v. *Sharpness*. 2 T. R. 47

10. But if he were to present a road, and the offender were thereon afterwards indicted and convicted, it seems he would then be entitled to costs as a public prosecutor within the act, *ib.*

11. And it was determined that a justice, who *indicts* a road for being out of repair (the indictment being afterwards removed into K. B. by *certiorari*) is entitled to costs, under that statute, if the defendant be convicted. *R.* v. *Kettleworth*. 5 T. R. 33

12. So if he were to indict an inferior officer for disobeying an order made by him and convict him. 2 T. R. 47

13. The clerk of the peace, whose duty it is to draw up all presentments in the form of indictments, is a public prosecutor within the act. *ib.*

14. The prosecutor in a trial at bar is not within the act. *ib.*

15. *Qu.*—Whether the person really injured, who is the real prosecutor, be entitled to costs, if his name do not appear on the back of the indictment. *ib.*

16. In an action of debt for the penalty of the stat. 2. & 3 *E.* 6. c. 13. for not setting out tithes, with a count in the declaration for the single value: after a demurrer to the declaration, the parties submit to arbitration, and the arbitrator awards the single value to be less than 20 nobles (6*l.* 13*s.* 4*d.*) the plaintiff is not entitled to costs on the counts for the penalty, under the stat. 8 & 9 *W.* 3. c. 11. § 5. the value *not having been found by a jury*; but the court will allow him to have the costs taxed, on the count for the single value. *Barnard* v. *Moss*. 1 H. B. 107

17. If the defendants in an indictment for not repairing a road (and which is removed into K. B. by *certiorari*) be acquitted for want of prosecution, the court has no power to award costs to the defendants on the ground of its being a vexatious prosecution under stat. 13 *G.* 3. c. 78. § 65. but the application must be made to the judge at *nisi prius*. *R.* v. *Inhabitants of Chadderton*. 5 T. R. 272

18. If the judge, on the trial of an indictment for not repairing a road, certify that the defence was frivolous, without also awarding costs in express terms, under stat. 13 *G.* 3. c. 78. the prosecutor is entitled to costs.
R. v. *the Inhabitants of Clifton*. 6 T. T. 344

19. The prosecutor of an indictment for stopping a common footway, who had used it for some years before it was stopped up, is a party grieved within the meaning of 5 *W.&M.* c. 11. § 3.
R. v. *Williamson*. 7 T. R. 32

20. Justices of the peace may give costs in all cases of convictions, by stat. 18. *G.* 3. c. 19. *R.* v. *J. Arnold*. 5 T. R. 350

21. But justices of the peace at the quarter sessions have no authority by any act of parliament to order the costs of a prosecution for a misdemeanor, carried on under the direction of magistrates, to be allowed out of the county rates. *R.* v. *the Inhabitants of the W. R. of Yorkshire*. 7 T. R. 377
(See tit. COUNTY STOCK.)

22. If a person give notice of his intention to appeal to the quarter sessions against a poor-rate, but do not enter his appeal, the sessions cannot award costs to the other party under the stat. 17 *G.* 2. c. 38. § 4. as coupled with 8 and 9 *W.* 3. c. 30. § 8. *R.* v. *Esser* (*Justices*). 8 T. R. 583

23. Under stat. 4 *Ann.* c. 16. the *quantum* only of the costs of double pleading is left to the discretion of the court. 2 T. R. 391

24. Writ of error having been quashed because brought by a femme covert without her husband, the defendant in error is entitled to costs under stat. 4 *Ann.* c. 16. § 25.
M'Namara v. *Fisher*. 8 T. R. 302

25. The stat. 13 *C.* 2. stat. 2. c. 2. § 10. giving *double* costs to the *defendant* in error, if judgment be affirmed after verdict, is confined to cases where the judgment so affirmed is for *the plaintiff below* and not where *the defendant below* obtained judgment upon a special verdict.
Baring v. *Christie*. 5 E. R. 545

26. Costs are not allowed on the statute 3 *H.7.* c. 10. where a writ of error is non-prossed before the transcript of the record by the clerk of the Errors of B. R.
Salt v. *Richards & al. in error*. 7 E. R. 110

27. An avowant in replevin for rent in arrear, for whom verdict and judgment are given below, which are affirmed on a writ of error, is not entitled to his costs on the stat. 8 & 9 *W.* 3. c. 11. § 2. which is confined to judgments for defendants on demurrer.
Golding v. *Dias*. 10 E. R. 2

28. If the plaintiff enter a *noli prosequi*, the defendant is entitled to costs under stat. 8 *Eliz.* c. 2. § 2.
Cooper v. *Tiffin*. 3 T. R. 511

29. Where the plaintiff recovered a verdict at the trial and had judgment in C. P., and upon a bill of exception returned into this court, judgment was reversed, and the plaintiff took nothing by his writ, the defendant cannot have costs. *Bell* v. *Potts*. 5 E. R. 49

30. The prosecutor of a *quo warranto* information against a constable of *Birmingham* is not entitled to costs under stat. 9 *Ann.* c. 20.
R. v. *W. Wallis*. 5 T. R. 375

31. Costs are due to the plaintiff, who recovers treble damages in an action on stat. 29 *Eliz.* c. 4. against the sheriff for taking more than the fee allowed by that statute on levying under an execution against the plaintiff's goods.
Tyte v. *Glode*. 7 T. R. 267

32. A plaintiff who levies costs and expenses of execution under 43 *G.* 3. c. 46. § 5. must at his peril take care to keep them within such a reasonable sum as will be afterwards allowed in taxation; otherwise the court on motion will order the excess to be restored, with costs to be paid by the plaintiff.
Benwell v. *Oakley*. 2 W. P. T. 174

33. Debt on bond, where the plaintiff recovers a verdict for nominal damages only, and takes his judgment for the penalty, is not within the relief of the stat. 43 *G.* 3. c. 46. § 3. enabling the Court to allow the defendant costs, if the plaintiff do not *recover* the amount of the sum for which he had held the defendant to bail.
Cammack v. *Gregory*. 10 E. R. 525

34. An application for costs, under 43 *G.* 3. c. 46. cannot be supported by a reference to the facts stated on the trial; and an affidavit to support such an application, must shew on the face of it, that there was no reasonable or probable cause for the arrest.
Fountain v. *Young.* 1 W. P. T. 60

35. The stat. 8 & 9 *W.* 3. c. 11. giving costs in all *suits* of *scire facias*, does not extend to a *scire facias* to repeal a patent prosecuted in the name of the king. *R.* v. *Miles.* 7 T. R. 367

36. Though the defendant had judgment on demurrer in *quare impedit*, the Court of C. P. held that it was not entitled to costs under § 2. of stat. 8 & 9 *W.* 3, c. 11. *Thrale & al.* v. *London Bp. & al.* 1 H. B. 530.

37. After judgment by default in debt on bond to secure an annuity payable quarterly; and *scire facias* thereon, suggesting a breach in non-payment of a quarter, and damages assessed to that amount on the stat. 8 & 9 *W.* 3. *c.* 11.; held that the plaintiff was entitled to his costs on the 8th section, which directs a stay of proceedings *on payment of future damages, costs, and charges, toties quoties*; though the 3d section only gives costs in *scire facias* after *plea* or *demurrer*.
Brooke v. *Booth.* 11 E. R. 387

38. To entitle an officer defendant to double costs under the stat. 7 *Jac.* 1. *c.* 5. there must be a certificate of the judge who tried the cause (which may be granted either at the trial or afterwards) that the defendant was such an officer, and that the action was brought against him for something done by him in the execution of the office. *Harper* v. *Carr.* 7 T. R. 448

39. The statutes 7 *Jac.* 1. *c.* 5. and 21 *Jac.* 1. *c.* 12. § 3. giving double costs to parish officers sued, &c. extend not to actions against them for non-feazance, such as the non-payment of money laid out for the support of one of their paupers by another parish into which he went; and for which an action of assumpsit was brought against them. *Atkins* v. *Banwell.* 3 E. R. 92

40. Where in an action against officers of the excise for seizing goods, they do not tender amends before action brought, but pay money into court and afterwards gain a verdict, they are entitled only to single costs under stat. 23 *G.* 3. *c.* 70. § 31. *Collins & al.* v. *Morgan & al.* 1 H. B. 344

41. *Quære*, whether they are entitled to treble costs under § 34. of that statute if they tender amends? *ib.*

42. By a canal act the company were authorised to take certain lands for the purposes of the act on making certain payments either by annual rents or sums in gross, and the persons from whom the land was to be taken were empowered to distrain the goods of the company even off the premises in case of non-payment of such sums. An avowant stating a distress under this act of parliament is not entitled, on obtaining a verdict, to double costs under stat. 11 *G.* 2. *c.* 19. § 22.
Leominster Canal Company v. *Norris.* 7. T. R. 500
The same v. *Cowell & al.* 1 B. & P. 213

43. Though a local regulating act says, that "all monies paid, expended by, or recovered against the commissioners or their treasurer, &c. by means of any action, prosecution, &c. or *appeal*, for any cause relating to the act, or any thing done by or under the authority of the same, shall be defrayed *out of the money in the hands of the treasurer*;" it does not extend to discharge the commissioners from personal responsibility, in the first instance, for the costs of an appeal awarded to be paid by them, however they may afterwards reimburse themselves out of the fund in the treasurer's hands.
R. v. *Kingston & al.* 8 E. R. 41

44. And they may be indicted for non-payment of such costs. *ib.*

45. Where two several petitions signed by different persons were presented to the House of Commons against the return of members to serve in parliament for *East Grinstead*; which petitions were referred to the same select committee for trial, who reported them both to be frivolous and vexatious; the costs cannot be taxed *jointly* under the stat. 28 *G.* 3. *c.* 52.: and therefore the Speaker having first certified a joint taxation of costs for a certain sum against all the petitioners; and having afterwards by an amended certificate apportioned how much of the first mentioned sum taxed was incurred by the sitting members in opposing the two petitions *jointly*, and how much was incurred by them in opposing each *separately*; the plaintiffs, by the advice of the court of K. B. submitted to enter nonsuits as well in two several actions prosecuted against the respective petitioners for

the *separate* costs certified against each, as also in a joint action against all to recover the taxation certified against them all *jointly*. *Strachey, Bart.* v. *Turley and al.* 7 E. R. 507

46. And the Court of K. B. held that both these certificates being invalid, by reason that the act only authorizes the costs to be taxed *separately* on each distinct petition, a new and valid certificate, ascertaining the separate costs incurred on each petition, might be granted by the Speaker of a new parliament; the act mentioning *the Speaker* generally, *ib.*

COVENANT.

I. *Assignees, how they may enforce, and who are bound as such by Covenants, and how far the Assignor is discharged, &c.*

1. By 32 *H.* 8. *c.* 34. grantees of reversions have the same remedy against lessees, their executors, &c. as their grantors had. 3 T. R. 393

2. If mortgagor and mortgagee make a lease, in which the covenants for the rent and repairs are only with the mortgagor and his assigns, the assignee of the mortgagee cannot maintain an action for the breach of these covenants, because they are collateral to his grantor's interest in the land, and therefore do not run with it.

Webb v. *Russell.* 3 T. R. 393

3. But the mortgagor himself may.

Stokes v. *Russell.* 3 T. R. 678

[Affirmed in *Cam Scac. H.* 31 *G.* 3. 1 H. B. 562. where the point is thus stated. *A.* being possessed of a term of years, conveys it by way of mortgage, and joins with the mortgagee in a lease for a shorter term, *according to their respective estates and interests*, and the lessee covenants with the mortgagor and his assigns, to pay rent and repair. During the lease, the term, with all the estate and interest of mortgagor and mortgagee, becomes vested in the assignees of the reversion. The mortgagor may afterwards maintain an action of covenant against the lessee, the covenants being in gross.]

4. If tenant for a term of years, lease for a less term, and assign his reversion, and the assignee take a conveyance of the fee, by which his former reversionary interest is merged; the covenants incident to that reversionary interest are thereby extinguished. 3 T. R. 393

5. In covenant (which runs with the land), evidence that the defendant is in as *heir* will support a declaration charging him as *assignee*.

Derisley v. *Custance.* 4 T. R. 75

6. An action of covenant does not lie upon the statute 3 *W. & M. c.* 14. § 3. against the devisee of lands to recover damages for a breach of covenant made by the devisor. The remedy given by that statute being confined to cases where an action of *debt* lies.

Wilson v. *Knubley.* 7 E. R. 127

7. The devisee of the equity of redemption (the legal fee being in a mortgagee), is not liable in covenant as assignee of all the estate right, title, and interest of the original covenantor. *Carlisle (Mayor, &c.)* v. *Blamire.* 8 E. R. 487

8. A covenant in a lease, that the lessee, his *executors* and *administrators* shall constantly reside upon the demised premises, during the demise, is binding on the *assignee* of the lessee, though he be not named; being *quodam modo* annexed and appurtenant to the thing demised. *Tatem* v. *Chaplin.* 2 H. B. 133

9. In a lease of ground, with liberty to make a watercourse and erect a mill, the lessee covenanted for himself, his executors, &c. *and assigns*, not to have persons to work in the mill who were settled in other parishes, without a parish certificate. The Court of K. B. held that this covenant did not run with the land, or bind the assignee of the lessee. *Congleton (Mayor, &c.)* *Pattison.* 10 E. R. 130

10. In an action of covenant for rent on an indenture brought by the assignees of the lessor (a bankrupt), the lessee cannot plead that the lessor *nil habuit in tenementis*. *Parker and al. (Assignees)* v. *Manning.* 7 T. R. 517 [and see *Wilkins* v. *Wingate*, 6 T. R. 63.

11. A grant by lessees for lives of all their *estate, right, title, interest*, &c. in the premises to one and his *executors, habendum* to him and his executors for *99 years*, if the lives should so long exist, *in as large, ample, and beneficial way, &c.* as the grantors, their *heirs, &c.* held, is no assignment of the freehold, and consequently not of the *whole* interest of the grantors in their lease; and therefore the reversioners (the lives being expired within the term) cannot maintain covenant against the under-lessee for not delivering up the premises in good repair.

Earl of Derby v. *Taylor.* 1 E. R. 502

12. If tenant in tail male devise for a term of 99 years, and his lessee assign over

to another, but before such assignment tenant in tail male dies without issue male, no action of covenant upon the lease can be maintained against the representatives of the grantor by such assignee, the lease being void at the time of the assignment, and no interest passing under it.

Andrew v. *Pearce.* N. R. 158

13. An action of covenant lies against the assignee of a lessee of an estate for a part of the rent; as in such case the action is brought on a real contract in respect of the land, and not on a personal contract; and in case of eviction the rent may be apportioned, as in debt or replevin. *Aliter* in covenant against the lessee himself, who is liable on his personal contract.

Stevenson v. *Lombard.* 2 E. R. 575

14. Where an estate was conveyed to a trustee, *habendum* to him and his heirs, to the use of such person, and for such estate, as *W.* should by deed, &c, appoint; and for want of such limitation to the use of *W.* and his heirs; and the same conveyance reserved a certain fee-farm rent to the chief lord, and contained a covenant by *W.*, his heirs and assigns, for the payment of it: held, that *W.* took a vested fee, liable to be devested by the execution of his power of appointment. And *W.* having contracted to sell the estate, afterwards *by indentures of lease and release,* to which he and his trustee were parties, after reciting the former conveyance, *the trustees,* by direction of *W.* did *grant, bargain,* sell, and release; and *W.* did *grant, bargain, sell, alien, release, ratify, and confirm,* and also, *direct, limit, and appoint,* to the purchaser and his heirs, all their estate title, interest, use, trust, &c., in law and equity, subject to the reserved rent, and to the performance of covenants on the part of *W.* to be performed: and the purchaser also covenanted with *W.* to pay the said rent, and to *indemnify and save him harmless:* held, that the purchaser took the estate by the appointment of, and not by conveyance from *W.*: the instruments (a lease and release) though more commonly and properly adapted to pass an interest, and containing words of grant for that purpose, yet professing in terms to be an appointment; and and the trustee having joined in it by the direction of *W.*, which was unnecessary if it had been intended that the purchaser should take an estate derived only out of the interest of *W.*; and it being obviously for the benefit of the purchaser to take by appointment, and such appearing upon the whole to have been the intention of the parties: and held in consequence, that the defendant (the heir, devisee, and executor of the purchaser) was not liable in covenant for rent in arrear, either as executor, or assignee of the land, which was not bound in the hands of *W.*'s appointee by *W.*'s covenant.

Roach v. *Wadham.* 6 E. R. 289

II. *Condition precedent; what shall be construed as.*

1. No precise technical words are required in a deed to make a stipulation a condition *precedent* or *subsequent;* neither does it depend upon its being prior or posterior in the deed. But it must depend on the nature of the contract, and the acts to be performed by the contracting parties. *Hotham* v. *the East India Company.* 1 T. R. 638

2. If the defendants prevent the performance of a condition precedent by their neglect and default, it is equal to performance by the plaintiffs.

Per Cur. 1 T. R. 645

3. A covenant in a charter-party, "that no claim should be admitted or allowance made for short tonnage, *unless* such short tonnage be found and made to appear on arrival of the ship, on a survey by four shipwrights to be indifferently chosen by both parties," is not a condition precedent to the plaintiff's right of recovering for short tonnage; but is a matter of defence to be taken advantage of by the defendant: and the not averring performance is no ground for arresting the judgment.

Hotham v. *the East India Company.* 1 T. R. 6 8

4. In covenant on a charter-party, by which it was agreed to employ a ship of which the plaintiff was the captor, *as soon as condemnation should have passed,* the sentence must be taken to mean a *legal* sentence; and the party who sues for the freight must aver that the ship was condemned by a court having competent jurisdiction.

Unwin v. *Wolseley.* 1 T. R. 674

5. In a lease for years containing the usual covenants that the lessee shall pay the rent, keep the premises in repair, &c. there was a proviso that the lessee might determine the term at the

end of the first three or five years, giving six months previous notice, and that then, and from and after the expiration of such notice, and payment of all rents and duties to be paid by the lessee, and performance of all his covenants until the end of the three or five years, the indenture should cease and be utterly void; it was held that the payment of rent and performance of the other covenants were conditions precedent to the lessee's determining the term at the end of the first three years, and that his merely giving six months' notice expiring with the first three years was not sufficient.

Porter v. *Shepherd (in error)*. 6 T. R. 665

6. By the proposals of the *Phœnix* Company it is stipulated that "persons insured shall give notice of the loss forthwith, deliver in an account, and procure a certificate of the ministers and churchwardens, and some reputable householders of the parish, importing that they knew the character, &c. of the assured, and believed that he really sustained the loss, and without fraud;' On the question, whether the procuring of such a certificate were a condition precedent to the right of the assured, to recover on the policy, the Court of C. P. were divided, and gave judgment *pro formâ* for the plaintiffs; but the Court of K. B. on a writ of error reversed the judgment, holding this to be a condition precedent; and that it was immaterial that the minister, &c. wrongfully refused to sign the certificate. *Wood, & al.* v. *Worsley*. 2 H. B. 574; and *Worsley* v. *Wood & al. (in error*, 6 T. R. 710.—and *Oldman & al.* v. *Bewicke, C. P. M.* 20 *G.* 3. 2 H. B. 577, *n.*

7. A certificate of some reputable householders alone is not sufficient. 6 T. R. 710

8. Where one, as a member of a life insurance society for the benefit of widows and female relations, entered into a policy of assurance with the society, for a certain annuity to his widow after his death, in consideration of a quarterly premium to be paid to the society *during his life*: and the society covenanted to him and his executors, &c. that if he should pay to their clerk the quarterly premium on the quarter days *during his life*, and if he should also pay his proportion of contributions which the *members* of the society should, during his life be called on to make, in order to supply any deficiencies in their funds: then, on due proof of his death, the society engaged to pay the annuity to his widow; and, by the rules of the society, if any member neglected to pay up the quarterly premiums for 15 days after they were due, the policy was declared to be void, unless *the member (continuing in as good health as when the policy expired)* paid up the arrears within six months, and 5*s*. per month extra. The Court of K. B. held that a member insuring, having died, leaving a quarterly payment over-due at the time of his death the policy expired; and that a tender of the sum by his *executor, though made within* 15 *days after it became due*, did not satisfy the requisition of the policy, and the rules of the society which required such payment to be made by the member *in his life-time, continuing in as good health as when the policy expired.*

Want & al. v. *Blunt & al.* 12 E. R. 183

9. In covenant on a charter-party of affreightment in which defendant covenanted to pay so much for freight for "goods delivered at *A.*," the delivery of goods at *A.* being considered as a condition precedent, it was held that freight could not be recovered *pro rate itineris* if the ship were wrecked at *B.* before her arrival at *A.*, though the defendant accepted his goods at *B.*

Cooke v. *Jennings*. 7 T. R. 381

10. Where a charter-party of affreightment, provided that in case of the "inability of the ship to execute or proceed on the service," certain persons should be at liberty to make such *abatement* out of the freight as they should think reasonable; held that an inability of the ship to proceed to sea for want of men to navigate her was within the proviso, although such want of men proceeded from the ravages of the small pox amongst the original crew, the death of some, and the desertion of others from fear of the distemper, and an impossibility of procuring others on the spot in their room.

Beatson v. *Schank*. 3 E. R. 233

10. Where a charter-party, dated 6th *February*, but averred not to be executed till the 15th of *March*, contained a covenant by the owner that the ship *should and would* proceed from *D.*, where she *then* lay, *on or before*

the 12th February, on her outward bound voyage, and return, &c. and a covenant by the freighter that *in consideration of every thing abovementioned*, &c. he would pay certain freight for the voyage; the voyage being averred to be performed, and the freight earned, the owner may recover in an action of covenant, without averring that the ship sailed *on or before the 12th of February*, such covenant that the ship should sail *on or before the 12th of February* being either no condition precedent but only an independent covenant, for breach of which the party had his remedy in damages; or not in the substance of the contract, which was for the performing of the voyage for which the ship was chartered, and earning the freight; or being rendered impossible to be performed by the parties themselves not having executed the deed till after the time appointed for doing the act, and thereby dispensing with the performance of it.

Hall v. *Cazenove*. 4 E. R. 477

(And see tit. DEED 7.)

11. *A.* covenants that he will, *on or before a certain day* convey to *B.*, *by such conveyance as B.'s counsel should advise*, all the ground before conveyed to him by *C.*; in consideration of which *B.* covenants to pay a certain sum, and reserve certain rents, &c. to *A.*, and to lay out a certain sum on the premises; held, that *A.* cannot maintain covenant against *B.*, without averring such a conveyance, or a readiness to convey to *B. on or before the* day *all* the land, but that *B.* prevented him by some act or neglect of his. And it is not sufficient to maintain *covenant* to shew that after the day *B.* accepted a conveyance of ground rents in lieu of part of the land, and accepted that and the conveyance of the other part in lieu of the conveyance covenanted to be made by *A.*; for this is a substitution of a different agreement by parol, to which the covenant does not apply.

Heard v. *Wadham*. 1 E. R. 619

III. *Of dependant and concurrent Covenants.*

1. Whether covenants be or be not independent on each other, depends on the reason of the case. 6 T. R. 571. 668

2. Where any thing is to be done by a plaintiff before his right of action accrues on the defendant's covenant, it must be averred in the declaration that that thing was done. 6 T. R. 571

3. But where *A.*, in consideration of 250*l.* paid by *B.*, and of the further sum of 250*l.* to be paid, *&c.* covenanted that he would, with all possible expedition, instruct *B.* in a certain mode of bleaching linen (for which he had obtained a patent), and *B.* covenanted that he would on or before 25th *February* 1794, or sooner, if *A.* should before that time have instructed him, *&c.* pay the farther sum of 250*l.*; it was held that the covenants of *A.* and *B.* were independent covenants, and that *A.* might sue *B.* for the 250*l.* without averring that he had taught *B.* the mode of bleaching linen, *&c.*

Campbell v. *Jones*. 6 T. R. 570

4. *A.* agreed to sell *B.* his estate for a certain sum before a particular day, in consideration whereof *B.* agreed to pay that sum on the day, and on failure to pay 21*l.*; it was held that they were dependant covenants, and that *A.* could not recover the 21*l.* without shewing a conveyance on his part, or a tender of one.

Goodisson v. *Nunn*. 4 T. R. 761

5. So where the plaintiff covenanted to sell to the defendant a school-house, *&c.*, and to convey the same to him on or before the 1st *August* 1797, and to deliver up the possession to him on 24th *June* 1796; and *in consideration thereof* the defendant covenanted to pay the plaintiff 120*l.* on or before the said 1st *August* 1797; held, that the covenant to convey, and that for the payment of the money were dependent covenants; and that the plaintiff could not maintain an action for the 120*l.* without averring that he had conveyed, or tendered a conveyance to the defendant. *Glasebrook, Clerk* v. *Woodrow, Clerk*. 8 T. R. 366

6. By the conditions of the sale of a copyhold estate, it was stipulated that the purchaser should pay down a deposit, and sign an agreement for the payment of the residue of the purchase money at a certain time, *on having a good title*, and that he should have a *proper surrender*, on payment of that residue; in an action brought by the seller for the non performance of the conditions on the part of the purchaser, it was held by the Court of C. P. to be insufficient, to state that the seller had been *always ready and will-*

ing, and frequently offered to make a good title to the said estate, and to make a proper surrender on payment of the purchase money. The declaration ought to have averred that the seller *actually made a good title, and surrendered* the estate to the purchaser, *or a tender and refusal;* and also to have shewn what title the seller had.

Phillips v. *Fielding*. 2 H. B. 123 (But see 1 H. B. 270: 6 E. R. 555.)

7. Where in articles of agreement under a penalty, there are mutual covenants between *A.* and *B.* to do certain acts, and also a covenant which *gave to the whole consideration on each side;* to an action of debt for the penalty brought by *A.* against *B.* on account of the non-performance of his part, *B.* may plead in bar a breach by *A.* of the covenant which goes to the whole consideration *St. Albans (Duke)* v. *Shore*. 1 H. B. 270

8. Therefore where in articles of agreement for the sale of lands, it was agreed that *A.* the seller should take in part of payment, a conveyance of other lands belonging to *B.* the buyer, and it was also agreed "that all timber trees, which were upon any of the estates should be valued by appraisers, and paid for by the respective purchasers at a given time;" to an action of debt brought by *A.* against *B.* for the penalty, on his refusal to complete the purchase, *B.* may plead that *A.* before the time, cut down a certain number of trees, and thereby rendered himself unable to perform, and it was impossible for him to perform the agreement; for which reason *B.* declined, and refused to carry the agreement into execution on his part. 1 H. B. 270

9. But where there are mutual covenants which do not go to the whole consideration, the breach of one cannot be pleaded in bar to an action for the breach of the other. *Boone* v. *Eyre*, *B. B. E.* 17 *G.* 3. 1 H. B. 275, *n.*

10. *A.* covenants to build a house for *B.*, and finish it on or before a certain day, in consideration of a sum of money, which *B.* covenants to pay *A.* by installments, as the building shall proceed. The finishing the house is not a condition precedent to the payment of the money, but the covenants are independent: *A.* therefore may maintain an action of debt against *B.* for the whole sum, though the building be not finished at the time appointed. *Terry* v. *Hunlze*. 2 H. B. 389

11. In a policy of insurance against loss by fire from half a year to half a year, the assured agreed to pay the premium half yearly, "as long as the insurers should agree to accept the same," within 15 days after the expiration of the former half year; and it was also stipulated that no insurance should take place till the premium was actually paid; a loss happened within 15 days after the end of one half year, but before the premium for the next was paid; it was held, that the insurers were not liable, though the assured tendered the premium before the end of the 15 days, but after the loss.
Tarleton v. *Staniforth*. 5 T. R. 695 [Affirmed in *Cam. Scac.* 1 B. & P. 470: Anst. 707.]

12. By a policy under seal, referring to certain printed proposals, a fire office insured the defendant's premises from 11th of *Nov.* 1802 to 25th *Dec.* 1803, for a certain premium, which was to be paid yearly on each 25th of *Dec.* and the insurance was to continue *so long as the insured should pay the said premium at the said times, and the office should agree to accept it.* And by the printed proposals it was stipulated, that the insured should make all future payments annually at the office within 15 *days after the day limited by the policy, upon forfeiture of the benefit thereof,* and that *no insurance was to take place till the premium were paid,* And by a subsequent advertisement (agreed to be taken as part of the policy) the office engaged that all persons insured there *by policies for a year or more, had been and should be considered as insured for* 15 *days beyond the time of the expiration of their policies;* yet held, notwithstanding this latter clause, the assured having, before the expiration of the year, had notice from the office to pay an increased premium for the year ensuing, otherwise *they would not continue the insurance,* which *the assured had refused;* that the office was not liable for a loss which happened *within* 15 *days from the expiration of the year* for which the insurance was made, though the assured, after the loss and before the 15 days expired, tendered the full premium which had been demanded. The effect of the whole contract, &c. taken together, being only to give the assured an option to continue the insurance or not, during

15 days after the expiration of the year, by paying the premium for the year ensuing, notwithstanding any intervening loss, provided the office had not, before the end of the year, determined the option by giving notice that they would not renew the contract.

Savin v. *James.* 6 E. R. 571

13. By indenture, between *A* and *B.* and *C.*, dissolving their partnership as rope-makers, *A.* and *B.* covenanted to allow *C.* during his life 2*s.* on every cwt. of cordage *which they should make on the recommendation of C. for any of his friends and connexions, and whose debts should turn out to be good;* and that *A.* and *B.* should stand the risk of such debts incurred, *but should not be compelled to furnish goods to any of C.'s connexions whom they should be disinclined to trust.* And *C.* covenanted *not to carry on the business of a rope-maker* during his life (except on government contracts); and that all debts contracted or to be contracted in his or their names, pursuant to the indenture, should be the exclusive property of *A.* and *B.*; and that *C.* should, during his life, exclusively employ *A.* and *B.*, and no other person, *to make all the cordage* ordered of him by or for his friends and connexions, *on the terms aforesaid*, and *should not employ any other person to make any cordage on any pretence whatsoever:* the Court of K. B. held that the covenant by *C.* to employ *A.* and *B.* exclusively to make cordage for his friends, and not to employ any other, &c. (*A.* and *B.* not being obliged to work for any other than such as they chose to trust), was not illegal and void, as being in restraint of trade without adequate consideration; for the whole indenture must be construed together, according to the apparent reasonable intent of the parties; and the general object being only to appropriate to *A.* and *B.* so much of *C.*'s private trade as they chose to give his friends credit for, so much only was covenanted to be transferred, and *C.* was still at liberty to work for any of his friends who were refused to be trusted by *A.* and *B:* by which construction the restraint on *C.* was only co-extensive, as in reason it could only be intended to be, with the benefit to *A.* and *B.*; and therefore the restraint on *C.* could be no prejudice to public trade.

Gale v. *Reed.* 8 E. R. 80

IV. *Joint and several.*

1. In a case of colleries, *B.* and *C.* the lessees, "jointly and severally," *&c.* did, and each of them did covenant, *&c.* with *A.* (the lessor) in manner following, *viz.*": here followed a set of covenants by the lessees; then followed some covenants by the lessor; and then others by the lessees, in *one* of which they "and each of them did" agree, *&c.*; held that *all* the covenants on the part of the lessees were several as well as joint.

D. of Northum. v. *Errington.* 5 T. R. 522

2. If the obligee of a bond covenant not to sue one of two joint and several obligors, and if he do, that the deed of covenant may be pleaded in bar, he may still sue the other obligor.

Dean v. *Newhall.* 8 T. R. 168

3. Even if the obligee sue the first obligor, the latter cannot plead that the former *released* him, though he may plead the covenant in bar, which as between those parties operates *quâ* a release. 8 T. R. 168

4. A covenant to and with *A.*, his executors, administrators, and assigns, and to and with *B.* and his assigns, to pay an annuity to *A.*, his executors, &c. during *B.*'s life, is a joint covenant to *A.* and *B.*, in which they have a joint legal interest, although the benefit be for *A.* only; and therefore on the death of *A.* the right of action survives to *B.*, and *A.*'s administrator cannot sue on the covenant.

Anderson v. *Martindale.* 1 E. R. 497

V. *Renewal; Covenants for.*

1. *A.* and *B.* covenant in a lease for 61 years, "that at any time within one year after the expiration of 20 years of the said term of 61 years, upon the request of the lessee, and his paying 6*l.* to the lessors, they would execute another lease of the premises unto the lessee, *for and during the farther term of 20 years, to commence from and after the expiration* of the said term of 61 years &c. *And so in like manner,* at the end and expiration of every 20 years, during the said term of 61 years, for the like consideration, and upon the like request, would execute another lease *for the further term of 20 years, to commence at and from the expiration of the term then last before granted,*" &c.: under this covenant the lessee cannot claim a further term of 20 years at the expiration of the last term of 20 years in the lease,

if he has omitted to claim a further term at the end of the first and second 20 years.

Rubery v. *Jervoise & al.* 1 T. R. 229

2. If a lease for 99 years determinable on three lives be conveyed in trust for *A.* for life; and *A.* covenant to use his utmost endeavours as often as any of the persons on whose lives the premises are held shall die, to renew the same by purchasing of the lord of the fee a new life in the room of such as shall fail; it is no breach of the covenant, if, upon one of the lives failing, he procure a renewal upon his own life. *Scudamore & al.* v. *Stratton & al* 1 B. & P. 455

VI. *Rent and Taxes; Covenants to pay.*

1. The bankruptcy of the lessee is no bar to an action of covenant (made before the bankruptcy) brought against him, for rent due since. *Mills* v. *Auriol.* 1 H. B. 433. affirmed in K. B. *Auriol* v. *Mills.* 4 T. R. 94

2. Neither is a seizure and sale of the lease under a writ of *fieri facias*, or *elegit*, against the lessee. 4 T. R. 99

3. Nor a forfeiture by his attainder. *Id.*

4. A lessee, who covenants to pay rent and to repair, with an exception of casualties by fire, is liable upon the covenant for rent, though the premises are burnt down, and not rebuilt by the lessor after notice.

Belfour v. *Weston.* 1 T. R. 310

5 Under a power to a tenant for life to lease for years, reserving the *usual* covenants, *&c.* a lease made by him, containing a proviso, that in case the premises were blown down, or burned, the lessor should rebuild, otherwise the rent should cease, is void; the jury finding that such covenant is unusual. *Doe d. Ellis and Medwin* v. *Sandham.* 1 T. R. 705

6. The lessee of a coal mine, who covenants to pay a certain share of all such sums of money as the coal *shall sell for at the pit's mouth*, is not liable under that covenant to pay to the lessor any part of the money produced by sale of the coals elsewhere than at the pit's mouth. *Clifton* v. *Walmesley*, 5 T. R. 564;—*& Gerrard* v. *Clifton*, *(in error)* 7 T. R. 676: *reversing the judgment of C. P.* 1 B. & P. 524

7. If there be any fraud upon the covenant in the lessee, in such case a court of equity would give relief. 5 T. R. 567

8. Evidence of the lessee's having accounted with the lessor, and paid him the share of the money produced by the sale of coal elsewhere, is not admissible to explain the intention of the parties. 5 T. R. 567

9. In covenant on an indenture of demise of a coal mine, made on the 8th of *July* 1805, reserving 1-4th of the coal raised, or the value in money at the election of the lessor; and if the 1-4th fell short of 400*l.* per ann. then reserving such additional rent as would make up that *annual* sum, to be rendered *monthly* in equal portions: the Court of K. B. held that the lessor having elected to take the whole in money may declare for *two years and three months'* rent in arrear. But even if the money-rent were reserved annually, the plaintiff may remit his claim as to the three months' rent, and enter up judgment for the two years' rent only. And having first well assigned a breach of the covenant, that the lessees had not yielded monthly the 1-4th, or the value in money, &c. but had refused, &c.; held that it would not hurt on *general* demurrer, that the count went on to alledge, that before the exhibiting of the plaintiff's bill, *viz. on the 1st of* November 1797, 900*l.* of the rent reserved for two years and three months was due and in arrear; for that date being before the lease made, and therefore impossible in respect to the subject matter, must be rejected; and the general allegation that before the exhibiting of the plaintiff's 900*l.* of the rent reserved, &c. was due is sufficient.

Buckley v. *Kenyon.* 10 E. R. 139

10. *J. T.* demised land to the plaintiff at an annual rent for 21 years with liberty to dig half an acre of brick earth annually: the lessee covenanted that he would not dig more, *or* if he did that he would pay an increased rent of 375*l.* per half acre, *being after the same rate that the whole brick earth was sold for.* A stranger dug and took away brick earth: the lessee recovered against him the full value of it; it was held by the Court of C. P. that he was entitled to retain the whole damages.

Attersoll v. *Stevens.* 1 W. P. T. 183

11. Under a covenant in a building lease by the tenant to pay all the taxes, except the land-tax, the landlord is only to pay the *old land-tax*, and not the

additional land-tax occasioned by the improvement of the estate.

Hyde v. *Hill.* 3 T. R. 377

And see *R.* v. *Scott.* 3 T. R. 602

12. A distinct covenant in a lease, whereby the tenant bound himself to pay the *property tax*, and all other taxes imposed on the premises, or on the landlord in respect thereof, though void and illegal by the stat. 46 *G.* 3. *c.* 65. § 115. will not avoid a separate covenant in the lease for payment of rent clear of all parliamentary taxes, &c. generally; for such general words will be understood of such taxes as the tenant might lawfully engage to defray.

Gaskell v. *King.* 11 E. R. 155

VII. *Repairs, &c.; Covenants for.*

1. A lessee of a house, who covenants generally to repair, is bound to repair it if it be burned by an accidental fire.

Bullock v. *Dommitt.* 6 T. R. 650 (See *ante* VI. 5.)

2. So on a covenant to build a bridge in a substantial manner, and to keep it in repair for a certain time, the party is bound to rebuild the bridge, though broken down by an extraordinary flood. *Brecknock, &c. Navigation Co.* v. *Pritchard.* 6 T. R. 750

3. When the law creates a duty, and the party is disabled to perform it without any default in him, the law will excuse him: but when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, notwithstanding any accident by inevitable necessity. 6 T. R. 751

4. Covenant in a lease that the lessee, would not dig gravel out of any part of the demised premises without consent of the lessor, or paying to him 10*s.* *per* load, except what should be dug out of two acres, part of the premises demised, and part of a garden late in the possession of *A. B.*: By indorsement made on the lease before execution, it was agreed that it should be lawful for the lessor to let any part of the within demised premises for the purpose of making bricks or tiles, he paying the lessee 3*l.* for every acre which he should so let; and further, that it should be lawful for the lessee to break up and dig, for gravel, any part of the within demised premises, he covenanting to pay to the lessor 20*l.* for every acre he should break up and dig, at or before the expiration of the time, and to make good the same; held that the lessee was not entitled to dig for gravel in the two acres of garden ground mentioned in the lease without making them good.

Flint v. *Brandon* N. R. 73

5. The lessee covenanted to repair, *&c.* "casualties by fire and tempest excepted:" *quere*, if the landlord be bound to repair in either of the excepted cases?

Weigall v. *Waters.* 6 T. R. 488

6. To an action by a lessor for a breach of covenant on an indenture of lease in not repairing, *&c.* the lessee who has occupied during the whole term, and left the premises out of repair, cannot plead in bar that the lessor had only an equitable estate in the premises; for that is tantamount to a plea of *nil habuit in tenementis.* But *semble*, the lessee is not estopped from shewing that the lessor was only seized in right of his wife for her life, and that she died before the covenant broken; because an interest passed by the lease. *Blake* v. *Foster.* 8 T. R. 487

7. Where certain premises were demised to the lessee together with "the *use* of the pump in the yard jointly with the lessor *whilst the same should remain there*," held that these words reserved to the lessor, the power of removing the pump at his pleasure; and that it was no breach of covenant in the lessor to remove it during the continuance of the demise.

Rhodes v. *Bullard.* 7 E. R. 116

8. A covenant, by a tenant, to yield up in repair at the expiration of his lease, all buildings, which should be erected during the term, upon the demised premises, includes buildings erected and used, by the tenant, for the purpose of trade and manufacture, if such buildings be let into the soil, or otherwise fixed to the freehold, but not where they merely rest upon blocks or pattens.

Naylor & al. v. *Collinge.* 1 W. P. T. 19

VIII. *Quiet Enjoyment, Title, &c.*

1. In alledging a breach of covenant for quiet enjoyment, it is sufficient to alledge that, at the time of the demise to the plaintiff, *A. B.* had lawful right and title to the premises, and having such lawful right and title, entered, &c. and evicted him, &c.; without shewing what title *A. B.* had,

or that he evicted the plaintiff by legal process, &c.

Foster v. *Pierson.* 4 T. R. 617

2. And on the authority of the foregoing case, the Court (of K. B) held that in alledging such a breach the plaintiff may state generally that *A. B.* lawfully claiming title under the defendant, entered by virtue of such title on the plaintiff, without setting forth the particulars of *A. B.*'s title.

Hodgson v. *E. I. Comp.* 8 T. R. 278

3. *Non infregit conventionem* cannot be pleaded where the plaintiff assigns a breach (as above), adding, "and so the defendant did not keep his covenant," &c. 8 T. R. 278

4. Alledging that "the party having a lawful right and title entered," is equivalent to saying, "he entered by lawful right and title." 4 T. R. 621

5. If a lessor covenant for quiet enjoyment against the *lawful* let, suit, entry, &c. of himself, his heirs and assigns, the declaration for a breach of the covenant need not expressly alledge that he entered *claiming title*, if the disturbance complained of be such as clearly appears to be an assertion of right. *Lloyd* v. *Tomkies.* 1 T. R. 671

6. In an action against executors, in their own right, on a covenant for good title and quiet enjoyment against any person or persons whatever, contained in an assignment (by way of mortgage) of a lease to their testator, the declaration must shew a breach by some act of the covenantors; or that the evictor's title commenced prior to the assignment made by them.

Noble v. *King & al.* 1 H. B. 34

7. A covenant in a conveyance of lands in *America*, during the time of the rebellion in that country, that the grantor had a legal title, and that the grantee might peaceably enjoy &c. without the let, interruption, &c. of the grantor and his heirs *or of any other person whomsoever*, is not broken by the States of *America* seizing the lands as forfeited for an act done previous to the conveyance; notwithstanding the subsequent acknowledgment of their independence by this country. *Dudley* v. *Folliot.* 3 T. R. 584

8. Such a covenant does not extend to the acts of wrong-doers, but only to persons claiming by a legal title: for, "let, interruption," &c. means "*lawful* let and interruption." 3 T. R. 584

9. In covenant for quiet enjoyment, the declaration stated, that before the demise to the plaintiff, the defendant had made a demise to *A.*, which was then subsisting; that in order to get into possession, the plaintiff brought an ejectment, but was nonsuited on account of that prior demise; and that he had never been in possession; plea that for the first half year of the plaintiff's lease the plaintiff might have enjoyed &c. but that for nonpayment of the rent for 21 days after that half year, the defendant had a right to re-enter, according to a proviso in the lease, and that he did re-enter, &c.; it was held on demurrer, that this was no answer to the plaintiff's demand.

Ludwell v. *Newman.* 6 T. R. 458

10. The seller covenants to the purchaser of an estate that he shall enjoy and receive the rents, &c. without any action, &c. or interruption by the seller or those claiming from him, or *by, through, or with his or their acts, means, default, &c.*: held that a breach was well assigned in respect of certain quit-rents in arrear before and at the time of the conveyance, though not stated to have accrued while the seller was tenant of the premises.

Howes v. *Brushfield.* 3 E. R. 491

11. *A.* after granting certain premises in fee to *B.*, and warranting the same against himself and his heirs, covenanted that notwithstanding any act by him done to the contrary, he was seised of the premises in fee, *and that he had a good right, full power, &c. to convey*; held, that either these general words, "good, right," &c. though introduced by the words "and that," were part of the preceding special covenant; or if not, that the general construction of the instrument required, that the restriction in the other covenants to the acts of the covenantor and his heirs, must be applied to them also.

Browning v. *Wright.* 2 B. & P. 13

12. But where the assignor of certain shares in a patent right covenanted that he had good right, full power, and lawful authority to assign and convey the said shares, and that he had not by any means, directly or indirectly, forfeited any right or authority he ever had over the same; it was held, that the generality of the former words of the covenant was not restrained by the latter.

Hesse v. *Stevenson.* 3 B. & P. 565

13. And where releasors covenanted that, *for and notwithstanding any act, &c. by them, or any or either of them done to the contrary*, they had good title to convey certain lands in fee; *and also* that they or some or one of them, *for and notwithstanding any such matter or thing as aforesaid*, had good right and full power to grant, &c.; *and likewise* that the releasee should *peaceably and quietly enter, hold, and enjoy* the premises granted, *without the lawful let or disturbance of the releasors or their heirs or assigns, or for or by any other person or persons whatsoever*; and that the releasee should be kept harmless and indemnified by the releasors and their heirs against all other titles, charges, &c. *save and except the chief rent* issuing and payable out of the premises to the lord of the fee. The Court of K. B. held that the *generality* of the covenant for *quiet enjoyment* against the releasors and their heirs, *and any other person or persons whatsoever*, was not restrained by the *qualified* covenants for *good title* and *right to convey* for and not withstanding *any act done by the releasors to the contrary*.

Howell v. *Richards*. 11 E. R. 633

COUNTY RATE.

1. A high constable may be appointed, and a county rate levied *de novo*, for a town erected into a county of itself by charter many years before, although no such officer had been appointed or such rate levied before; the corporation of the town having defrayed the expenses out of their own funds. *James* v. *Green*. 6 T. R. 228
2. And the like point was determined in the case of a town corporate having an exclusive commission of the peace, although not a county in itself.

Weatherhead v. *Drury*. 11 E. R. 168
3. A building given by a corporation for the purpose of a house of correction about 70 years ago, and maintained by them to the present time, is not a house of correction within the exception of stat. 17 *G.* 2. *c.* 5. § 31. liable to be maintained by the corporation; but the public may be called upon to support it by a county rate. 6 T. R. 663
4. The stat. 18 *G.* 3. *c.* 19. which enables the court in certain cases to make an order on the treasurer of the "county, riding, or division," where the offence was committed, to pay the prosecutor and his witnesses their expenses, extends to inferior districts having jurisdiction to try felons, and raising their own rates similar to the county rates. *R.* v. *Myers*. 6 T. R. 237
5. Where before the stat. 12 *G.* 2. *c.* 29. the county rates had been assessed upon the entire district or place of *Hartishead* with *Clifton*, but the two townships of *H.* and *C.* separately maintained their own poor, and were used to contribute towards the county rates in certain fixed proportions between themselves: yet as that statute only establishes the accustomed proportion of contribution to the county rates as between the entire districts which were before assessed to such rates within the limits of the respective counties, &c. and does not meddle with the proportions which had used to be observed as between the subdivisions of those districts, this case was by the Court of K. B. held to fall within the 3d section, which provides that where there is no poor-rate in the *parish, township or place* assessed to the county rates (by which must be understood no entire poor's rate co-extensive with the place or district assessed to the county rates) the county rates shall be raised by the petty constables in such manner as by law the poor's rate is to be assessed and levied: that is by an equal rate on all the inhabitants, &c.

R. v. *YorkshireJust.* (*W.R.*) 12 E. R. 117

COUNTY STOCK.

1. If a fine be imposed on a county, which the justices at the sessions think illegal, they may order the treasurer to defray the expense of litigating the question out of the county stock.

R. v. *Inhab. of Essex*. 4 T. R. 591

[See title COSTS IX. 21.]
2. So they may the expense of litigating any question respecting the repairs of the highways or county bridges, or the purchase of land adjoining to such bridges. 4 T. R. 594, 595, 596

COURT, CONTEMPT OF.

A by-stander in the court fined and imprisoned for disturbing it. 6 T. R. 530

COURT-MARTIAL.

1. It is not incident to the office of commander in chief of a squadron to have authority to hold a court-martial.
Johnstone v. *Sutton (in error) Exch. Ch.* 1 T. R. 548
Affirmed in *Dom. Proc.* 1 T. R. 784
2. It is totally inaccurate to state martial law as having any place whatever within the realm of *Great Britain*, merely because the decision of certain matters relating to the army is by a court-martial. 2 H. B. 98, 99
3. Courts-martial being established in this country by positive law, their proceedings and the relation in which they stand to the courts of *Westminster Hall*, must depend upon the same rules with all other courts, which are instituted and have particular powers given them, and whose acts therefore may become the subject of application to the courts at *Westminster* for a prohibition. 2 H. B. 100
4. Courts martial are bound by the same rules of evidence as the courts of common law; and their general proceedings, where not otherwise regulated by act of parliament, must follow the same course. The case of the mutineers of the *Bounty*, ship of his majesty (cited). 1 E. R. 313
Mr. *Stratford's* case. *ib.*

CUSTOM.

1. A custom within a manor, that lands shall descend to the *eldest sister*, where there is neither a son nor a daughter, does not extend to an *eldest niece*; but the lands must descend according to the rules or the common law, in default of such son, daughter, and sister.
Denn d. Goodwin, and Spragg & Ux. v. *Spray*. 1 T. R. 466
(See tit. COPYHOLD I. 1.)
It seems that a custom for the homage to assess a compensation in lieu of *heriot*, to be paid by an in-coming copyholder on surrender or alienation is not good.
Parkin v. *Radcliffe*. 1 B. & P. 282
3. Where a plea of justification in trespass for taking two horses, as heriots, stated a custom in the manor that the lord *from time immemorial, until the division* of a certain tenement into moieties, had taken and been accustomed to take a heriot upon the death of every tenant dying seised; and *since the division* the lord had taken and been *accustomed* to take on the death of every tenant dying seised of either of the moieties a heriot for each moiety: this must be taken to be one entire custom, and not two distinct customs, the one applicable to the tenement *before*, and the other *after* the division of it: and being said to be an *immemorial* custom, it is disproved by evidence that the division was made within memory.
Kingsmill, Bart. v. *Bull*. 9 E. R. 185
4. A custom to swear the jurors at one court leet *to inquire*, and to *return* their presentments at the *next* court, is bad in law.
Davidson v. *Moscrop*. 2 E. R. 56
5. A custom for *poor and indigent householders* living in *A.* to cut and carry away the rotten boughs and branches in a chase in *A.* cannot be supported; the description of the persons entitled being too vague.
Selby v. *Robinson*. 2 T. R. 758
6. And where the defendant justified, in trespass, under such a custom, which was found for him, the court set aside the verdict on that issue, and entered a verdict for the plaintiff, with nominal damages. 2 T. R. 758
7. Beech being admitted to be *timber* by the custom of the county of *Bucks*, the general rule of law applicable to timber trees in general attaches upon it, so as to give it the properties and privileges of *timber* at 20 years growth: and therefore upon an issue whether certain beech trees in that county were or were not *timber*, according to the custom of the county, the inquiry is confined to the nature of the wood, and the period of its growth, whether of 20 years; and no evidence can be received to qualify its character of *timber*, by shewing that it was not deemed to be such in the county, unless the tree contained ten feet of solid wood.
Aubrey v. *Fischer*. 10 E. R. 446
8. A custom that all the customary tenants of a manor *having gardens, parcels* of their customary tenements respectively, have immemorially by themselves, their tenants and occupiers, dug, taken, and carried away from a waste within the manor, to be used upon their said customary tenements, *for the purpose of making and repairing grass plots in the gardens, parcels of the same respectively, for the* IMPROVEMENT *thereof, such turf covered with grass, fit for the pasture of cattle, as hath been fit and proper to*

be so used, at *all* times of the year, *as often, and in such quantity as occasion hath required*, is bad in law, as being indefinite and uncertain, and destructive of the common: and so is a similar custom for taking and applying such turf *for the purpose of making and repairing the banks and mounds in, of, and for the hedges and fences* of such customary tenements.

Wilson v. *Willes, Knt.* 7 E. R. 121

8. A custom for all the inhabitants of a parish to play "at all kinds of lawful games, sports, and pastimes in the close of *A.*, at all seasonable times of the year at their free will and pleasure" is good. But a similar custom "for *all persons*, for the time being, being in the said parish," is bad.

Fitch v. *Rawling.* 2 H. B. 393

9. A custom that every *pound* of butter sold in a particular market-town shall weigh 18 ounces, is bad.

Noble v. *Durrell.* 3 T. R. 271

10. Whether a custom that butter shall be sold in *lumps* of a certain weight, may not be supported? *Qu.* 3 T.R.271

11. A custom to take a profit in *alieno solo*, is bad; such a right can only be claimed by prescription.

Grimstead v. *Marlowe.* 4 T. R. 717
And *Hardy* v. *Holiday, E.* 5 *G.* 3. *C. B.* cited. 4 T. R. 718

12. Evidence of a custom in *Guernsey*, that acts of parliament do not bind the people till registered, cannot be received. *Attorney General* v. *Le Marchant, H.* 28 *G.* 3. 2 T.R. 201, *n.*

D.

DEED.

I. *Execution of.*

1. If *A.* execute a deed for himself and his partner, by the authority of his partner and in his presence, it is a good execution, though only sealed once.

Ball v. *Dunsterville & al.* 4 T. R. 313

2. *A.* executed a bond as the joint and several bond of himself and *B.*, and signed it "*A.* and *B.*," having no authority from *B.* so to do; held that the bond was good, as the several bond of *A.* *Elliot* v. *Davis.* 2 B. & P. 338

3. One who covenants for *himself, his heirs*, &c. and under his *own hand and seal*, for the act of another, shall be personally bound by his covenant, though he describe himself in the deed as covenanting *for and on the part and behalf of such other person.*

Appleton v. *Binks.* 5 E. R. 148

4. A person executing a deed for his principal under a power of attorney, should sign in the name of the principal. 6 T. R. 176

5. One who executes a deed for another under a power of attorney must execute it in the name of his principal; but if that be done, it matters not in what form of words such execution is denoted by the signature of the names; as if opposite the seal be written "for *J. B.*" (the principal) "*M. W.*" (the attorney), ("*L. S.*")

Wilks v. *Back.* 2 E. R. 142

II. *General Matters relating to.*

1. One may declare in covenant that the deed was *indented, made, and concluded* on a day subsequent to the day on which the deed itself is stated on the *face of it to have been indented, made, and concluded.*

Hall v. *Cazenove.* 4 E. R. 477

2. The cancelling of a deed, or the loss or destruction of it, will not divest property which has once vested by transmutation of possession under the deed. 2 H. B. 263: and see 3 T. R. 156

3. Where a purchaser of a small part of an estate takes a covenant from the vendor to produce the title deeds whenever it shall be necessary, and the deeds afterwards come into the vendee's possession on his taking a mortgage of the other part of the estate, and he then assigns a mortgage to a third person, not mentioning the deeds, such third person cannot maintain trover against him for the deeds.

Yea v. *Field.* 2 T. R. 708

4. Upon contract for the sale of an estate, the title and abstract to be made at the vendor's expense, the purchaser is entitled to the custody of the abstract until either the purchaser is finally rescinded by consent or declared impracticable in a court of equity; and meanwhile may maintain trover for it if delivered to the vendor for a special purpose and not returned. When the contract is rescinded the

abstract becomes the property of the vendor; if the sale is completed it is the property of the vendee; But it seems that an opinion arisen thereon, is the property of the vendee.

Roberts v. *Wyatt.* 2 W. P. T. 268

5. The deed of a surety does not extinguish the simple contract debt of the principal. 6 T. R. 176

6. A conveyance by lease and release, the release containing the words "all land &c. belonging, used, occupied, and enjoyed, or deemed, taken, or accepted as part thereof, &c." will pass leasehold lands held for a long term of years, and occupied for many years as part of the estate, as well as freehold; especially against the releasor. *Doe d. Davies & al.* v. *Williams.* 1 H. B. 25

7. A lease for a year being made between *A.* and *B.* the release, stating *B.* to be a trustee for *C.*, *granted* the premises unto *C.* in his possession being, by virtue of an indenture of lease, bearing date the day before the release, and to his heirs, *habendum* to *B.* and his heirs, to such uses as *C.* should appoint: held, the release sufficient to convey the premises to *B.*, and the words in the granting part "unto *C.*" &c. may be rejected as surplusage.

Spyve v. *Topham.* 3 E. R. 115

8. *A.* being mortgagee in fee of certain lands, and *B.* the mortgagor entitled to the equity of redemption, by lease and release *A.* conveys and *B.* releases the lands to *C.* in fee, who by the same instrument covenants with and grants to *B.* that it shall be lawful for *B.* his heirs and assigns at all times to enter upon the lands to search and dig for coal, and to take and carry away the same to his and their own use: this is only a *licence*, and conveys no interest in the soil, so as to exclude *C.* and those claiming under him from getting coal there, nor could it operate as an *exception* or *reservation* out of the grant in respect to *B.*, who had not the legal title in him at the time.

Chetham v. *Williams & al.* 4 E. R. 469

9. *A.* the mother of *B.* having entered into a bond on his behalf for 1000*l.* *B.* executed an indemnity bond of the same date, *viz.* 26th *April* 1800, in the sum of 2000*l.* conditioned for the payment of 1000*l.* three months after her decease. After this *A.* made a codicil to her will, by which she relinquished two debts due from *B.*, and desired him to be punctual in indemnifying her estate against the said 1000*l.* bond; three days after the execution of this codicil, she executed a release to *B.* in which after mentioning specifically three debts due to her from *B.* on certain securities, expressed that she had agreed to release *B.* from those sums "and of and from all or any other sum or sums of money, claims and demands, thereby secured or intended to be secured, and all other sum or sums of money, claims and demand whatsoever;" and released him accordingly from those sums and all claim on account of those sums, or for or on account of any other matter, cause, or thing whatsoever." Held, 1st, that this release did not extend to the indemnity bond; and 2dly that no extrinsic evidence could be admitted to explain the intentions of *A.* as to the release.

Butcher v. *Butcher.* N. R. 113

10. *A.* by indenture (reciting that a suit was depending between him and *B.* respecting the infringement of certain patents, and that it was apprehended these patents could not be fully assigned until the determination of the suit, without hazard of defeating it) granted absolutely the said patents, together with some others to *C.*, excepting however until the determination of the said suit, such patents as should be necessary to support *A*'s legal title: with a covenant that *A.*, upon the determination of the suit, should assign the excepted patents to *C.* and that until such assignment *A.* should stand legally possessed of the same for the behoof of *C.*; held, that the legal interest in the excepted patents vested in *C.* upon the determination of the suit, without further assignment, so as to entitle him to maintain an action for the infringement of them.

Cartwright v. *Amatt.* 2 B. & P. 43

11. *A.* being possessed of a lease for years, covenanted with *B.* in an indenture for making provision for certain relations of both, that if he should die during the continuance of the term of the lease, his executors or administrators should assign the residue of such term to *B.* who was then to pay a yearly sum of money for the purposes of the deed. *A.* afterwards purchased the reversion in fee and died; held that he was not precluded by his covenant from purchasing the fee, and

that therefore his executors were not liable upon the covenant.

Williamson v. *Butterfield.* 2 B.& P.62

12. There being a proviso in a deed, that an annuity which was granted by another deed should cease if a lady should associate, continue to keep company with, or cohabit, or criminally correspond with *J. F.* The Court of C. P. held that all intercourse whatever, though the most innocent, was within the terms of the deed.

Dermor (Ld.) v. *Knight.* 1 W.P.T.417

III. *Voluntary or Fraudulent.*

1. If a person, having several creditors, convey by deed the legal interest in part of his real and personal property to a trustee, in trust (after deducting the expenses respecting the trust), out of the rents and profits to pay half the surplus to the grantor for his own use, and the residue among certain creditors named in a schedule, without any intention of fraudulently delaying the creditors not named in the schedule in obtaining their demands, the deed is good in law.

Estwick v. *Caillaud,* 5 T. R. 420 (See *Anst.* 381.)

2. There is no fraud in the assignee of a term assigning over his interest to whom he pleases, with a view to get rid of a lease, although such person neither takes actual possession nor receives the lease. *Qu.* If the replication *per fraudem* by the lessor, to a plea of assignment in such a case, can ever be good? certainly not, where the party assigning receives no benefit from the premises.

Taylor v. *Shum & al.* 1 B. & P. 21

3. A *voluntary* settlement of lands made *in consideration of natural love and affection* is void as against a subsequent purchaser for a *valuable* consideration though with notice of the prior settlement before all the purchase money was paid, or the deeds executed; and though the settlor had other property at the time of such prior settlement, and did not appear to be then indebted, and there was no fraud in fact in the transaction: for the law, which is in all cases the judge of fraud and covin arising out of facts and intents, infers fraud in this case, upon the construction of the stat. 27 *Eliz. c.* 4.

Doe d. Otley v. *Manning.* 9 E. R. 59

4. The release of an adverse claim to a litigated estate, is a good and valuable consideration in a deed to avoid a former voluntary grant by virtue of stat. 27. *Eliz. c.* 4. although the relessee was not party to the original suit, but came in by consent, and entered into an order of reference; and although he could not have been bound by the judgment in the original suit. *Hill (Clk.)* v. *Exeter (Bp.) & al.* 2 W. P. T. 69

DEMURRER TO EVIDENCE.

On a demurrer to circumstantial evidence the party offering the evidence is not obliged to join in demurrer, unless the party demurring will distinctly admit upon the record, every fact and every conclusion, which the evidence offered conduces to prove.

Gibson & al. v. *Hunter.* 2 H. B. 187

DESCENT.

1. *A.* seised in fee of a copyhold of inheritance by descent *ex parte maternâ,* surrendered to the use of himself for life, remainder to such persons and for such estates as he should by deed or will, attested by three witnesses, appoint, remainder in default of appointment to himself in fee; afterwards he mortgaged and surrendered to the use of the mortgagee in fee, who upon repayment of the principal and interest surrendered to the mortgagor: held that the line of descent was thereby broken, and that the estate descended to the paternal heir.

Doe d. Harman v. *Morgan.* 7 T. R. 103

2. A feoffment and refeoffment break the line of descent. 7 T. R. 105

3. The rule of *possessio fratris* does not apply to estates-tail; nor even to inheritances in fee-simple,, without an actual possession of the brother of the whole blood. *Doe d. Gregory & d. Geere* v. *Whichelo.* 8 T. R. 211

4. *J. A.* devised all his lands to *S. A.* (his son by the first venter) when he should come to the age of 21 years, but if he should die before 21 years, and *D. A.* (the testator's daughter by the second venter) should be then living, he gave the same to her when she should attain 21 years. Testator died, and then *S. A.* died under age and without issue: held, that on the death of *S. A.* the inheritance vested in *D. A.* his sister of the half blood in preference to his uncle of the whole blood.

Doe d. Andrew v. *Hutton.* 3B.& P.643

5. Devise of all the testator's real and personal estate and effects to *B. V.* his wife, in trust for the education of his daughter *M. V.* till 21, and in case of the death of his daughter before 21, the whole of his said estate and effects to his wife; Testator died leaving *B. V.* his wife and *M. V.* his only child. *B. V.* died leaving *M. V.* also her only child, and then *M. V.* died underage and without issue; the Court of C. P. held that the heir of *M. V. ex parte maternâ* was entitled to suceeed.

Goodtitle d.Castle v. *White.* 2 N. R. 383

6. A rectory in Kent formerly belonging to one of the dissolved Monasteries having been granted by Henry VIII to a layman to be holden in fee by knights service in *capite:* the Court of C. P. held that the lands were descendable according to the custom of gavelkind, but the tithes according to the common law. *Doe d. Lushington* v. *Landaff (Bp.) & al.* 2 N. R. 491

DETINUE.

7. ***detinue,*** when the goods are alleged to have come to defendant, by finding, it is sufficient for the plaintiff to prove that the goods came to the defendant by wrong. At least unless the ***finding*** be traversed.

Mills v. *Graham.* N. R. 141

DEVISE.

I. *Conditional, Contingent, or Executory Devises; their Construction.*

1. Where the testator had three sisters, (one of whom was married), and devised lands to trustees and their heirs, "in trust that they and their heirs should, during the life of the married sister, receive the rents and profits, and pay the same to the two other sisters, their heirs and assigns: and from and after the decease of the husband, in case the married sister should be then living, to the use of the three sisters severally in thirds for life, with several remainders to their first and other sons in tail, remainder to the daughters as tenants in common, with cross remainders between the sisters on default of issue of their bodies respectively, remainder over in tail:" the condition of the married sister's surviving her husband is not annexed to any of the limitations subsequent to the limitation of the life estate; and the remainder-man in tail may alone make a good tenant to the præcipe upon the death of the three sisters without issue, notwithstanding the husband be then living.

Horton v. *Whitaker.* 1 T. R. 346

2. Where a testator devised certain freehold estates "to and amongst his seven sisters (naming them; to the exclusion of an eighth sister, to whom a legacy was left) for life, share and share alike; and after the decease of any of them, her share to go to her first and other sons in tail, ***and in default of such sons,*** to and amongst her daughters, as tenants in common, in tail; and in case any of his said seven sisters died without leaving ***any issue*** of her body begotten, or such issue died before 21, and without issue, then to and amongst the survivors of his said seven sisters and their issue, to descend in like manner as before mentioned; and in case all his said seven sisters should die without ***issue,*** or leaving issue such issue should all die before ***he, she,*** or ***they*** should attain 21 years of age, and without issue" then over. The Court of C. P. held that the words ***in default of such sons,*** did not make the remainders to the daughters of any sister depend on the contingency of the sister's having no son born, but that on the death of the sons of any of the sisters without issue, the remainder to the daughters of such sister took effect.

Doe d. Dacre (Barss.) v. *Dacre (Lady Dowager.)* 1 B & P. 250

3. *Buller* J. dissented from the other three judges of C. P. on the above case, and cited.

Keen de Pinnock et Ux. v. *Dixon, B. R. M.* 23 *G.* 3. 1 B. & P. 254, *n.* And *Denn d Briddon & Ux.* v. *Page, B. R. M.* 23 *G.* 3. 1 B. & P. 261, *n.*

4. But the Court of K. B. on a writ of error, unanimously affirmed the judgment of the Court of C. P.

Dacre (Lady Dow.) v. *Doe, Lessee of Dacre (Barss.)* 8 T. R. 112

5. Where the testatrix, by virtue of a settlement, had an estate for life, with a power to dispose of 1000*l.* in case *J. W.* or any issue of his should be living at her death, out of a term of 500 years vested in trustees, with remainder to *J. W.* for life, and then to his sons and daughters in tail, with remainder to herself in fee, and reciting the settlement and power, devised the said sum of 1000*l.* to trus-

tees for certain purposes, *if J. W. or any of his issue should be living at the time of her death;* and then devised that, *in case neither the said J. W. nor any issue of his body should happen to be living at the time of her decease, by which event the said manor, by virtue of and under the limitations in the said deed of settlement, &c. would devolve upon her and her heirs,* she gave the premises to the same trustees for 500 years, to raise the said 1000*l.* immediately after her decease, and within six months after to raise a further sum of 1000*l.*: and from and after the determination of the said term, and subject thereto, devised the premises to her mother for life, remainder to her own daughter in fee, remainder over to *A. W.* in fee, in case her daughtec should die before 21, or without issue; the contingency of *J. W.* or any of his issue not being living at the time of the testatrix's death is annexed to all the subsequent limitations; and he having survived the testatrix, the heir at law of the testatrix, and her daughter, who died before 21 and unmarrted, is entitled to the estate against *A. W.* the remainder-man in fee under the will. *Doe* v. *Wilkinson.* 2 T. R. 209

6. *A.* devised to his son *B.* for life, remainder to trustees during *B.*'s life to preserve contingent remainders, nevertheless to permit *B.* to receive the rents and profits, remainder to the first and other sons of *B.* in tail-male, remainder to *C.*; with a proviso, that if *B.* should succeed to the estate of *D.* the limitation of *A.*'s estate to *B.* should cease, and the next in remainder should take as if *B.* were dead: *B.* succeeded to *D.*'s estate before he had a son: held that the limitation to the trustees continued during the whole of *B.*'s life, so as to support the contingent remainders.

Doe d. Heneage v. *Heneage.* 4 T. R. 13

7. One devised lands to trustees in fee (subject to the uses of a certain term of 1000 years), to the use of *W. H.* for life, second son of the devisor's daughter lady *E.*, subject to the proviso after mentioned; remainder to trustees to preserve contingent uses during *W. H.*'s life, but to permit him to take the rents, &c.; and after his decease to the use of his first and other sons successively in tail male, subject to the same proviso, &c., and in default of such issue, remainder to the use of the *third and other sons of lady E.* successively in tail male, subject to the same proviso, &c.; and in default of such issue, with like remainders to the second son of lady *E.*'s eldest son, &c.; and in default of such issue to the use of the devisor's grand-daughter *C. H.* for life, subject to the proviso, &c.; remainder to trustees to preserve contingent uses, &c.; remainder to the use of her first son (the plaintiff) in tail male, with other remainders over, all subject to the same proviso; which was that *if W. H. or either of the persons to whom the estate was limited should become earl of E., the use limited to such person and his issue male should cease and be void, as if such person were dead without issue of his body.* The devisor's daughter lady *E.* at the time of his death had only two sons, her eldest (afterwards lord *E.*) and the said *W. H.*, but she had afterwards a third who died under age, and the said *W. H.* was let into possession at twenty-three, and had one son; and held, that on the death of his eldest brother without issue, by which event *W. H.* became earl of *E.*, the plaintiff who was then next in remainder supposing *W. H.* had in fact died without issue, was entitled under the will to take an estate in tail made in possession subject to the trusts of the term of 1000 years.

Carr v. *Erroll* (K. *of*) 6 E. R. 58

8. One having real and personal estates gave by his will several legacies and annuities, which he directed to be paid by his executrixes out of his real and personal estates, which he charged therewith; and then devised certain lands in *Y.* to *A.* and *H.* (two out of five daughters which he had), and *their heirs,* as tenants in common, *on condition* that, in case they or either of them should have no issue, they or she, having no issue, *should have no power to dispose of her share, except to her sister or sisters, or their children;* and he devised all the rest and residue of his real and personal estates to *A.* and to *H.* in fee; whom he made his executrixes. On his death *A.* and *H.* entered, and afterwards *A.* levied a fine of her moiety to the use of her husband in fee, and died; held, that the condition against alienation, except to sisters or their children, annexed to the devise to *A.* and *H.* and their heirs was good; and that for

the breach of it by *A.* in levying such fine, the heirs of the devisor might enter on her moiety; it being a remainder on which the residuary clause did not operate; held also, that one of the several co-heirs of the devisor might enter for non-performance or breach of the condition, and recover her own share in ejectment. For that where the entry upon a claim by one of several copareeners, who make but one heir, is lawful, such entry made generally will vest the seisin in all, as the entry of all. *Doe d. Gill & Ux.* v. *Pearson.* 6 E. R. 173

9. Under a devise to a wife for life, *provided she remains a widow*, but in case she marries a second husband, then to *J. S. when he shall attain his age of* 23 *years*, the wife has an absolute estate till *J. S.* is 23, though she marry before. *Doe d. Dean and Chapter of Westminster & al.* v. *Freeman & Ux.* 1 T. R. 389

10. An estate was devised to trustees and their heirs till *A.*, a female infant, should attain 21 or marry; and upon her attaining 21 or marrying, to *A.* and her heirs; and in case she should die under 21, without leaving issue, remainder over. *A.* married and had a child, which child died, and then *A.* died under 21: held that her husband was entitled to be tenant by the curtesy. *Buckworth* v. *Thirkell*, *T.* 25 *G.* 3. 3 B. & P. 652, *n*

11. If an estate be devised to *B.* the wife of *A.* for life, remainder to trustees, &c. remainder to the children of *A.* and *B.* and *their heirs* for ever, to be divided among them equally, and if but one child, to such only child, and his or her heirs for ever; and *for default of such issue*, remainder over; and at the death of the devisor *A.*, and *B.* have no child; the estate limited to their children is a contingent remainder in fee, which, on the birth of a child, will vest in that child, subject to open, and let in those who may be born afterwards; and the remainders over will be defeated by that estate becoming vested. In such a case the words "*for default of such issue*," mean "for default of such *children*."

Doe v. *Perryn.* 3 T. R. 484

12. One having an only child *Rebecca*, who was married and had three children, *Thomas*, *Rebecca*, and *Ann*, devised his copyhold to *Rebecca* his daughter for life, remainder to his grand daughter *Rebecca* for life, remainder to trustees to preserve contingent remainders, remainder to the use of the *issue of the body* of his grand-daughter *Rebecca*, in such parts, shares, and proportions, *manner and form*, as she should by deed or will appoint; and in default of appointment to the use of all and every the *children* of his said grand-daughter and *their heirs*, as tenants in common: and, *in default of such issue*, to the use of all and every the other children of his daughter *Rebecca* and their heirs, as tenants in common, &c.; and in default of such issue to his own right heirs. The Court of K. B. held that upon the death of the testator's daughter and of his grand-daughter *Rebecca*, without any appointment, an only child of the latter took an absolute fee; on whose death, under age and unmarried, the premises descended to her uncle *Thomas* as her heir at law; and that the subsequent limitations in the other children of the testator's daughter *Rebecca* did not take effect. For the devise to the *children* of his grand-daughter *Rebecca* and *their heirs* primâ facie carries a fee; and the subsequent words "in default of *such issue*" refer to *her children*, and not to *their heirs*; though the limitation over *in default of such issue* be made to those who might take as heirs to the children of *Rebecca* the grand-daughter. And the intention of the devisor that her children, if any, should take *a fee* is further evinced by this, that the limitation to them and their heirs is in default of appointment, under a power given her to appoint "to the use of "the issue of her body in such *manner* "and *form*, as well as in such parts, shares, and proportions) as she should "direct;" under which words "*manner and form*" she might have appointed to all or any of her children *in fee*, and was not restrained to appoint to them *in tail only*; which limitation, in default of appointment, is a substitution for the execution of the power. *R.* v. *Stafford, Marq. et al.* 7 E. R. 521

13. *A.* devised to *B.* for life, remainder to *C.* for 99 years if he should so long live, remainder to the heirs of the body of *C.*; the remainder to the heirs of the body of *C.* was held a contingent remainder, and not an

executory devise, and was defeated by C.'s surviving *B.*; there being no preceding estate of freehold to support it. *Doe d. Mussel* v. *Morgan*. 3 T. R. 763

14. Devise by *A.* of "all his estates to *B.* and the issue of her body, as tenants in common; but in default of such issue, or being such, if they should all die under 21 and without leaving issue," then over; held that all the limitations subsequent to that to *B.* were contingent, and were consequently destroyed by a recovery suffered by *B.*

Doe d. Davy v. *Burnsall*. 6 T. R. 30

15. A devise to *T. C.* for life, with remainder to his child or children, by any woman whom he should marry, and his or their executors, &c. for ever upon a condition that in case the said *T. C.* should die an infant unmarried and without issue, the premises should go to his father and his children and their heirs, &c.: the Court of K. B. held that *T. C.* having attained 21, and married before his death, the devise over could not take effect, for that such devise over was upon condition that *T. C.* died in his minority leaving neither wife nor child. *Doe d. Everett & al.* v. *Cooke & al.* 7 E. R. 269

16. Under a devise to *A.*, and to the *issue* of his body, *his, her, or their heirs, equally to be divided* if more than one; and if *A.* have no issue of his body living at his decease, then over; held that *A.* took at least an estate for life, with a contingent remainder in fee to his issue, if any; in which case the remainder over was also contingent, being a contingency with a double aspect; and that whether *A.* took for life, with such contingent remainders, or whether he took an estate tail, the remainders over were equally destroyed by his having suffered a recovery before he had any issue born.

Doe d. Gilman v. *Elvey*. 4 E. R. 313

17. And, on a case from the Court of Chancery, it appearing that *A.* had devised all his freehold *and leasehold* estates to *B.*, and the issue of her body "as tenants in common, but in default of such issue, or being such, they should all die under 21, and without leaving issue," then over; the Court of C. P. held that all limitations subsequent to that to *B.*, being contingent, the remainders in the freehold were barred by fine and recovery levied and suffered by *B.*; but that the leasehold vested in the remainder-man on the death of *A.* without issue, *B.* taking only an estate for life in them.

Burnsall v. *Davy & al.* 1 B. & P. 215

18. Devise to *G. L.* the testator's heir at law for life, and from and after his death to *C. B.* her heirs and assigns, in case she shall survive and outlive the said *G. L.* but not otherwise; and in case she shall die in the lifetime of the said *G. L.* then to *G. L.* his heirs and assigns for ever; held that the devise to *C. B.* was a contingent remainder, and barred by a fine levied by *G. L.*

Doe d. Planner v. *Scudamore*. 2 B. & P. 289

19. It is a settled rule of law that where the court can construe a devise to be a contingent remainder, they will never construe it to be an executory devise.

Per Rooke J. 2 B. & P. 298

20. Under a devise to *T. F.* and his heirs for ever, and in case he should depart this life, *and leave no issue*, then to *E.*, *M.*, and *S.*, or the survivor or survivors of them, share and share alike; the devise to *E.*, *M.*, and *S.*, is a good executory devise. *Roe d. Sheers & al.* v. *Jeffery & al.* 7 T. R. 589

21. If lands be devised to *A.* and his heirs and assigns for ever, and if he die *leaving no issue behind him*, then over; the limitation over is good by way of executory devise.

Porter v. *Bradley*. 3 T. R. 143

22. Lands were devised to the testator's son and his heirs for ever; as to part of the lands upon condition that he should pay to the testator's daughter an annuity till she came of age, and then a certain sum of money, and in default of payment that she should enter and enjoy the said part to her and her heirs for ever: and in case the son and daughter both died without leaving any child or issue, the reversion and inheritance of all the lands were devised to another: the Court of K. B. held that the devise over was not an executory devise but a remainder limited after successive estates-tail of the son and also of the daughter by implication: the intent being apparent that the devise over should not take effect till after failure of the issue of the son and daughter, and that it should then take effect; and this being the only construction which could give effect to such intent consistently with the whole of the will taken together.

Tenny d. Agar. v. *Agar.* 12 E. R. 251

moities of the said respective premises, than his, her, or their father or mother would have been entitled to, if living;" under this devise the grandchildren of *S. T.* and *A. L.*, though *in esse* at the date of the will, can only take *per stirpes*, and not *per capita*, in substitution of such of their parents as were dead at the determination of *T. H.'s* life estate.

Legard v. *Haworth.* 1 E. R. 120

5. The testator, having given 4000*l.* to *A.* and *B.* in trust for certain persons, by a residuary clause gave "all the rest of his estate and effects of what nature soever to *A.* and *B. their executors and administrators*, in trust to add the *interest* to the *principal* so as to accumulate the same, it being his will that the residue should not be paid or payable but at the time and manner as the principal sum of 4000*l.* was directed to be paid:" it was held that a house, the only freehold of which the testator was seized, did not pass by the will, notwithstanding there were general words in the introductory clause, "as to all his *estate* and effects both *real* and personal." *Doe d. Spearing* v. *Buckner.* 6 T. R. 610

6. Words may be supplied in a will to render a sentence complete and intelligible, in aid of the apparent intent to be collected from the whole context. As where a testator having two sisters *H.* and *J.*, and also two infant cousins *T.* and *G.*, the maintenance and education of which latter he recommened to his exccutrix and residuary legatee, devised his estate at *A.* to his sister *H.* for life, remainder to his sister *J.* for life, remainder to *T. in tail, remainder to G. in tail, &c.* remainder to his own right heirs. And then devised another estate at *B.* to his sister *J.* for life, *or if she should survive his sister H.*, so that she should come into possession of the estate at *A.* "then to *L. J.* (whom he made executrix and residuary legatee) for life, *towards the support, &c. of his cousin* T. and G. remainder *to the said* G. *in fee:* held, that as the word "or" so placed was unintelligible, and it was apparent from the whole context that the testator had in contemplation another alternative, namely *the death of his sister J.*, and meant to make a provision after the death of his sisters for his cousin *G.* as well as his cousin *T.*, the will should be read as if he had devised his estate at *B.* to "his sister *J.* for life, *and after her death, or* if she should survive his sister *H.* so that, &c. then, &c.;" and consequently *G.* took a vested remainder in the estate at *B.*, to which he became entitled in possession after the death of the testator's sister's sisters, and *L. J.* his executrix *although his sister* J. *did not survive his sister* H. *Doe d. Leech* v. *Micklin.* 6 E. R. 486

7. A mis-recital or mis-description in a will, may be remedied by the intent of the devisor apparent on the will. Thus where *A.* having an estate in the county of *M.*, of which he was seized *in fee, in possession*; and another estate in the county of *R.* of which he was also seised in fee, subject to the uses of his marriage settlement, which left him in equity a disposing power over the reversion only; both which estates had formerly belonged to an uncle, and came to him, the one by descent, the other by purchase from another co-heir of his uncle; by his will, mis-reciting the estate of which he was seised in fee in possession to be in the county of *R.*, instead of *M.*; and mis-reciting his disposable reversion to be in the county of *M.* instead of *R.*; devised *his estate*, so misdescribed to be in *R.*, which was in truth the reversionary estate, to his wife for life, remainder to his only son for life, remainder to his sons and daughters in tail, in strict settlement; remainder to his own daughter, &c.; and devised the reversion only of his estate, so misdescribed to be in *M.*, of which, in truth, he was seised in fee absolute, after the death of his wife and only son without issue, to his daughter, &c.; yet the Court of K. B. held, that enough appeared on the face of the will, which also described these estates as *formerly belonging to his uncle*, to shew that the devisor's intent was to pass the present interests of his estate in fee absolute, which was in the county of *M.*, and the reversion of his settled estate in the county of *R.*; although he had respectively misdescribed their local situations. *Moseley* v. *Massey & al.* 8 E. R. 149

8. *A.* devised thus: "as to my real and personal estate, subject to my debts and funeral expenses, I give and devise as follows, viz. my real estate and all my personal estate unto *J. M.* and *O. W.* and their heirs on the following

trusts, *viz.* to the intent that they dispose of my personal estate in discharge of my debts, funeral expenses, and such legacies as I may direct; and as to my real estates, subject to my debts, and such charges as I may make, I give and devise the same to *R. P.* for life, held that under this devise the legal estate in the reality vested in *R. P.* for his life, and *J. M.* and *O. W.* took no estate therein. *Kenrick* v. *Lord W. Beauclerck.* 3 B. & P. 175

9. A power of appointment by will is not executed by a mere devise of the residue.

Buckland v. *Barton.* 2 H. B. 136
Doe d. Hellings v. *Bird.* 1 E. R. 49

10. *A.* having an estate of his own in the county of *B.*, and another in *C.*, and having also the legal but no beneficial interest in an estate in *D.* with power of appointing it to either of his sons; by will devised "all his estates, of what nature or kind soever, as well copyhold as all other in the county of *B.*, and all in the county of *C.*, or elsewhere in the kingdom of *England, after payment of his debts,* &c." to a younger son. The Court of K. B held that the trust estate, which he had the power of appointing, did not pass by this general devise; it appearing by the words of the devise to be the intent of the testator to give such estates only as were entirely at his own disposal, and which he could charge with his debt. *Roe d. Reade* v. *Reade.* 8 T. R. 118

11. A general residuary clause will carry estates not in the contemplation of the testator; unless the will contains special indications of a contrary intention.

Morgan d. Surman v. *Surman.* 1 W. P. T. 289

12. Where a description of an estate is certainly expressed at first in a devise, the addition of another certain description may be rejected as surplusage; but it is otherwise where the estate first described is uncertain: One having purchased of *A.* the manor and certain lands of and in *H.*, in the counties of *D.* and *H.*, and having settled a rent-charge on his wife, out of his manor of *H., in the county of D.*, and *all other* his lands, &c. in *H.* aforesaid, *which he bought of* A.; and having afterwards purchased of *other persons* other lands in *H.* in the county of *H.* which were near another estate of his called U. in the county of *D.*: by his will, reciting and confirming *the settlement*, devised to trustees "the *said* manor, &c. and *other hereditaments of and in* H. APORESAID, and *all other* the manors, lands, farms, &c. and other hereditaments in or *near U.* aforesaid, or *elsewhere in the said county of* D.," to trustees for different uses; and as to all and singular the *said* manors and other hereditaments *in the said county of* D. with other appurtenances, &c. he devised the same to the first and other sons of his body, remainder to his daughters, in strict settlement; and if all but one of his daughters died without issue, "then as to the *entirety* of the *said* manors and other hereditaments," to the daughters of his remaining daughter in tail, &c.; *remainder* to the lessor of the plaintiff, *his nephew*, and heir at law; remainder to his sons and daughters in srrict settlement; remainders over to other junior nephews in like manner: with power to the trustees to raise money on the security "of the manors and other hereditaments *in the said county of* D.," and also to sell the devised lands, *except* such as were situate at *U.* or *H. aforesaid*, and to purchase other lands in fee *within the said* "*manor* of *H.* in *the said county of* D." &c. The devisor, by a subsequent codicil, in which he speaks of the prior devise of his *estate* in the county of *D.* revoked the devise to the lessor of the plaintiff. Held by the Court of K. B. that the *H.* lands lying *in the county of H.* and *not purchased of* A., though *situated within and surrounded by the general ambit of the county of* D. and also *near* U. and holden *together with* and *as part of*, a *farm in the county of D.*, did not pass by the will; which was confined in express terms to the manor and lands in *H. purchased of* A., or which lay *in the county of* D.

Doe d. Harris v. *Greadhed.* 8 E. R. 91

13. An heir at law is not to be disinherited but by express words: the court will, if possible, give effect to all the words of the will; on the ground of these two rules, the Court of K. B. determined that by a devise of "all my copyhold estates situate in *A., and which I became entitled to on the decease of my father;*" copyhold estates do not pass, which the devisor's father had surrendered to him in his life-time, though the *father* retained the posses-

sion of them to the time of his death, which happened prior to the will made by the son, there being other copyholds of the son answering the description in the will. *Doe d. Ryal* v. *Kell & al.* 8 T. R. 579

14. Under a devise of a manor, copyhold premises, parcel thereof, which were purchased by and surrendered to the lord subsequent to the time of making his will, will pass; and this, notwithstanding a subsequent demise of the premises by the lord from year to year. *Roe d. Hale* v. *Wegg.* 6 T. R. 708 (See *post.* XII.)

15. Where a testator had *freehold, customary,* and *copyhold* estates; and after introductory words, as to *all his worldly estate,* devised two rent-charges out of *all his real* estate, and also two *copyhold* in *Middlesex* for lives, and subject thereto, devised "all his *freehold* manors, lands, &c. in *Yorkshire* and other counties, and the reversion of the two copyholds to his son for life, with successive remainders in tail male to his first and other sons, with like remainders to other branches in the male line:" and in default of such issue he devised all his "*said* (freehold) manors, land," &c. to his eldest daughter in tail male in strict settlement, with like remainders to his second and third daughter; and by the residuary clause devised *all other* his manors, lands, &c. either *freehold* or *copyhold,* except those in the counties of *York,* &c. which he had before disposed of, subject to the said *rent-charges, in failure of issue male of his son* and himself, to his three daughters, as tenants in common in fee: held that certain *customary* estates being generally reputed and called *copyholds,* and the testator having distinguished in other parts of his will between *copyhold* and *freehold,* must be presumed to have used the word *freehold* in its usual and popular signification. And it seems that as by such residuary clause the daughters would not take till failure of issue male of the son, and of the devisor; the son (the heir at law) took an estate-tail by implication in the customary estates not before devised. *Roe d. Conolly* v. *Vernon.* 5 E. R. 51

16. *A.* by will devised "all his freehold and copyhold lands, tenements, and hereditaments," in trust for certain purposes, and afterwards purchased new lands; he then made a codicil whereby, after reciting that he had devised "all his freehold and copyhold lands tenements, and hereditaments" to the trustees named in the will, he revoked the devise so far as he related to two of the trustees, and devised "his said lands, tenements, and hereditaments" to the other trustees upon the same trusts, and concluded with declaring the codicil to be part of his will: held that the after-purchased lands did not pass. *Bowes* v. *Bowes, Dom. Proc.* 2 B. & P. 500

13. *A.* being seised in fee of several freehold estates, and also possessed of a leasehold rectory for lives, devised "all his manors, messuages, lands, tenements, tithes, and hereditaments, and all his real estate whatsoever (except what is therein after mentioned and devised), to trustees," in strict settlement; he charged his leasehold with rent charges to two of his younger children; and directed that when any of the lives dropped, the lease should be renewed, and the names of those two children put in, of whom a son was to have the preference: it was held that the rectory did not pass by the general words of the devise, but that *A.*'s eldest son and heir took, as special occupant, on the death of *A.* *Sheffield, Bart.* v. *Lord Mulgrave.* 5 T. R. 571 (See tit. SPECIAL OCCUPANT.)

17. The general words above used would have been sufficient to have passed the rectory if the devisor had so intended: but the limitations shewed that such was not his intention. 5 T. R. 571

18. In order to give effect to the devisor's general intent, the court will overlook a particular intent inconsistent therewith. 4 T. R. 82: 8 T. R. 5

19. *A.* devised to his wife his house and goods, with all his lands, goods, and chattels, whatsoever and wheresoever, for her life; and after her death to two younger sons till they should attain the age of 15, for their education. He then devised his aforesaid house, goods, and chattels, equally to be divided between all his sons and daughters, share and share alike; held that under the last clause of the devise the lands did not pass. *Roe d. Walker* v *Walker.* 3 B. & P. 375

21. The word "legacy" may be applied to a real estate, if the context of the will shew that such was the devisor's intention. 5 T. R. 716

22. Real property may pass under the description of "*personal* estates" in a will; it being manifest from the whole of the instrument, as by terms of direct reference to that description in ulterior dispositions of the same real property, that such was the devisor's intention.

Doe d. Tofield v. *Tofield.* 11 E. R. 246

23. A devise of all the residue of the testator's "money, stock, *property* "and *effects*, of what nature or "kind soever," to *A.* and *B.*, "to "be divided equally between them, "share and share alike," will pass *real* as well as *personal* estate, where from other parts of the will it appeared that the testator had applied the words *property* and *effects* to real estate. As where he began his will by stating, "as to my money and *effects*, I dispose thereof as follows," &c.; and then proceeded to dispose of parts of his *real* estate. And again, having lands interlying with another's lands, he directed the purchase of the latter, if offered for sale, to be added to his *other adjoining property. Doe, d. Andrew*, v. *Lainchbury.* 11 E.R.290

24. *E. C.* by his will, after making several pecuniary bequests, devised to *A. W.* the income of a certain cottage, and her living in it if she thought proper; and to *E. W.* the half of a certain estate: and all the rest and residue of his goods, &c. and also his lands, &c. he gave to his wife for life, with power "to give what she thought proper of *her said effects*" to her sisters the said *A.* and *E. W.* for their lives: and after the death of his wife and her two sisters he gave all his lands, &c. to his heir at law; held that the widow had power to devise to her sisters the real as well as personal estate before bequeathed to her by her husband; and *A. W.* having died before the widow, that the latter might among the rest bequeath the cottage, in which *A. W.* had a life interest, to her other sister *E. W.*

Doe d. Chilcott v. *White.* 1 E. R. 33

25. Where one devised a farm in his own occupation to his mother for life, remainder to *G.* in tail, and also devised to his mother "all his goods and chattels, stock of his farm, bonds, &c. and all other his moveables whatsoever," and made her executrix; held that growing corn, which was not reaped till after the death of the testator and of his mother, who died soon after him, passed to her representative, and not to *G.* the devisee of the land.

Cox v. *Godsalve* (C. J. *Holt's MSS.*) 6 E. R. 604, *n.*

26. The word *share* may carry a leasehold estate. As where a testator, having three sons and one daughter, and leashold estates and personal funds, devised one leasehold estate to his eldest son, and other leaseholds to his second son, directing his executors to receive and apply the rents until they came of age; and then directed a certain sum to be put out at interest for the benefit of his widow, *durante viduitate*, and that on her death or marriage it should be divided equally between his three sons, *share and share alike;* and then he gave his daughter 600*l.* to be paid to her when of age; and then gave the residue of his worldly effects to be divided equally amongst his three sons, *share and share alike;* and lastly directed that "if any of his said children died under age and without lawful issue, the *share* of *him* or *her* deceased should go equally amongst his surviving sons:" held, that the word *share* in the last clause referring as it must do to the *whole* share or portion of the *daughter*, must have the same meaning as to the sons, and must comprise the leasehold as well as personal funds before given to them; and that upon the death of the eldest son under 21, and without issue, the leasehold estate devised to him went equally between the two surviving sons.

Doe d. Stopford v. *Stopford.* 5 E.R. 501

27. By a bequest of an *house*, it is in general to be presumed that the testator meant to pass every thing which was occupied by him with it, as proper and convenient for the occupation of the house, though the word *appurtenances* be not added. 2 T. R. 502

28. Therefore where *A.*, being tenant for years of an house, gardens, stables, and coal-pen, bequeathed in the following words: "I give the house I live in and gardens to *B.*;" it was held that the stables and coal-pen occupied by *A.*, together with the house, passed, without being expressly named, though the testator used them for purposes of trade, as well as for the convenience of his house.

Doe v. *Collins.* 2 T. R. 498

29. The devisor having devised certain estates to *A.* in fee; and to his executors "all his money," &c. *stock*

upon his farm, with the implements of husbandry, and *all other his personal estate* of what nature or kind soever, in trust to pay debts and legacies, &c.: held that the devise of the *stock upon his farm* carried the standing crops of corn growing there at the time of his death, from the devisee of the land, to the executors; although there were assets, sufficient to pay all the debts and legacies without that aid.

West v. *Moore*. 8 E. R. 339

30. Land usually occupied with a house, will not pass under a devise of "a messuage with the appurtenances," unless it clearly appears that the testator meant to extend the word "appurtenances" beyond its technical sense.

Buck & al. Lessee of Whalley v. *Nurton*. 1 B. & P. 53

31. Under a general devise of all manors, messuages, lands, tenements, and hereditaments, leasehold messuages will not pass unless it appear to have been the evident intent of the devisor that they should pass.

Thompson v. *Lawley*. 2 B. & P. 303

32. The word *farm*, though coupled with words to pass freeholds in will may also pass a leasehold estate, if it appear to have been the testator's intention that it should so pass.

Lane v. Earl *Stanhope*. 6 T. R. 345

33. Therefore where *A*, being seised of several freehold estates, and possessed of a part of a farm held by a church lease renewable (the other part of the farm being freehold, and the whole having been always let together as one entire farm, at one rent), devised "all his manors, messuages, houses, farms, lands, woodland, hereditaments, and real estates whatsoever, to *B.*:" and gave "all the rest and residue of his ready money, rents in arrear, stock in the public funds, jewels, and personal estate whatsoever," to *C.*: it was held that the leasehold part of the farm passed under the first devise.

6 T. R. 345

34. One having a *freehold manor* of *Sutton*, and *freehold* lands *there*, and having also *copyhold* within the *township* of *Sutton*, and within the local ambit of the manor, but held of another manor, and having surrendered his copyhold to the use of his will, devised all his *manor* of *S.*, and all his messuages, *farms*, lands, tenements, and hereditaments whatsoever, *within the precincts and territories* of *S.* in the county of *Chester* with their rights, members, and appurtenances, in trust for his daughter, *L.*, (having devised other estates in other counties to two other daughters) and to her children in strict settlement: the Court of K. B. held; 1. That *farms*, lands, &c. within the *township*, though *not* within the *manor* of *Sutton*, passed by the description of *farms* &c. *within the precincts and territories of* S. 2. That the general words "messuages, *farms*, lands," &c. and particularly the word *farms*, were sufficient to carry *copyhold* as well as *freehold* in the place described, if such appeared to be the intent of the testator upon the whole will. 3. That such intent was evinced in this case by the word *farms*, where it appeared that the testator had a farm composed of copyhold and freehold, which he had let as one entire subject, and which must otherwise be divided: and also by this, that he had charged the property devised beyond the annual income of it, unless the *copyhold* were included. 4. That a small copyhold distant 8 miles, and a small freehold 20 miles from *Sutton*, but within the county of *Chester*, did not pass by that devise, but did pass under a general residuary clause to another daughter. *Doe d. Belasyse* v. *Lucan Earl*. 9 E. R. 448

35. A devise to *A.* and *B.*, strangers to each other, creates a joint-tenancy, and the conveyance by one severs the joint tenancy and passes a moiety; but if the devise be to husband and wife, they take by entireties and not by moieties, and the husband cannot by his own conveyance devest the estate of the wife. 5 T. R. 654

36. Therefore where a mortgagee of a copyhold estate in possession under a forfeited mortgage, and considered as irredeemable, devised it as land as husband and wife in fee, it was held the conveyance of the husband alone, without the concurrence of his wife, passed no interest against the wife surviving.

Doe d. Freestone v. *Parrott*. 5 T. R. 652

37. Devise to a trustee to receive and pay the rents and profits for the maintenance of *S.* a femme covert, and the issue of her body, during her life, and after her decease, upon trust for the use of *the heirs of the body of* S.; their

heirs and assigns for ever, *without regard to seniority of age or priority of birth:* and *in default of such issue,* to the use of the right heirs of the testatrix: held that *S.* took only an estate for life, and that the heirs of her body took as purchasers and as joint tenants; and therefore that the eldest son of *S.*, dying in her life time, his eldest son could not take either the whole as heir of the body of *S.*; or a part as heir to his father.

Doe d. Hollen v. *Ironmonger.* 3 E. R. 533

38. Devise to the use and behoof of the testator's niece *S. C.*, and his two nieces *E. G.* and *A. G.*, and the survivor and survivors of them, and the heirs of the body of such survivor and survivors as tenants in common, and not as joint tenants: held that under this devise *S. C.*, *E. G.* and *A. C.* took as tenants in common.

Garland v. *Thomas.* N. R. 82

39. Where after a devise to one for life, the devisor limited the estate to trustees *and their heirs,* in trust to preserve contingent remainders, and to permit the tenant for life to take the profits, with remainder over on his decease; and he afterwards gave other estates for lives, with several remainders over, and after each estate for life he interposed the same estate to trustees and their heirs: held that this shewed his intent to be, that the estates to the trustees should be confined to the lives, of the several tenants for lives, and consequently that those in remainder took legal estates their being no other circumstance in the will to shew a contrary intent.

Doe d. Compere v. *Hicks.* 7 T. R. 433

40. One devised a rent-charge to his wife for life, together with the interest of 1200*l.* and after her decease devised the rent charge to trustees and their heirs, to sell and dispose of the same and distribute the purchase money amongst certain persons: and after giving a few small legacies, he directed his household goods, &c. to be sold; and the money arising from the sale of the rent-charge, and from his household goods, &c. *and from all other his estate and effects of what nature or kind soever and wheresoever,* he directed should be first liable to the payment of legacies, and the residue to be divided into certain parts, which he bequeathed to certain persons; with a proviso that the receipt of the trustees to a purchaser of the rent-charge should be sufficient without seeing to the application of the purchase money; and then he appointed the said trustees and his wife his executors: held that the trustees did not take the legal estate in the real property of the devisor.

Hilton v. *Kenworthy.* 3 E. R. 552

41. Under a devise of *lands, arrears of rent,* and *a bond and judgment,* to trustees and the *survivor,* and the *executors, &c.* of such survivor, in trust, *out of the rents and profits* of the said estates and arrears, &c. to pay certain *annuities* for *lives,* and *a sum in gross;* and from and after payment of the said annuities and money, the testator devised successive estates for lives, remainder to *C. W.* in tail, remainder to his own right heirs; and he also gave a general power of *leasing* to the trustees for the best rent, with an allowance of 10*l.* a year to each for their trouble; held that *the purposes of the trust being all answered* by the death of the annuitants, and the raising of the money for legacies, the remainderman in tail (the life estate being spent), took the *legal* estate in the premises.

Doe d. White v. *Simpson* 5 E. R. 162

42. *A.* by will gave to his wife an annuity of 200*l.* for her life, in addition to her jointure (which was secured upon an estate in the *West Indies*), and 6,000*l.* to his two younger children, to be paid at 21, and appointed *B. C* and *D. as trustees of inheritance* for the execution thereof: held that no interest passed to *B. C.* and *D.* in the testator's real estates. *Trent* v. *Hanning.* N. R. 116

43. *A.* devised to *B.* his wife for life, and empowered her to devise the same to any one or more of his child or children in such manner, share, and proportion as she should appoint, "but so as the said estate should not be divided, but transmitted whole and entire to his heirs;" and in another part (after devising an adjoining estate in the same way) he added that his will was that "they should be considered *as one estate, and be transmitted entire to his family;*" and in default of appointment, to his own right heirs; *B.* by will devised and appointed to their son *C.* for life, remainder to trustees to preserve contingent remainders, remainder to the first and other sons of *C.* in tail general, remainder to the daughters of *C.* in tail general, and with the like limitations to *D.* and

E. two other children; all their children *C. D.* and *E.* were alive when *A.* devised; *Qu.* what estates did they severally take? *Per* Lord *Kenyon*, Ch. J. and *Grose* J. they respectively took estates in tail general; *per Ashhurst* and *Buller* Justices, they respectively took life estates, with remainders in tail to their respective children.

Griffith v. *Harrison.* 4 T. R. 737

44. Under a devise of *all* the devisor's lands to his niece *S. E.* for life, and after that estate determined, *the same* to trustees to preserve contingent remainders, and after her decease then to remain to her first and other sons successively in tail, remainder to her daughters as tenants in common in tail: and for default of such issue then *to the issue* of the devisor's four sisters *in such manner as he had limited the same to his niece's issue;* and for default of such issue of his sisters to his own right heirs; held that the devise is in effect to his niece *S. E.* for life, remainder to her first and other sons successively in tail, remainder to her daughters as tenants in common in tail *with cross remainders* (by implication) *between those daughters;* remainder *to the issue of the four sisters of the devisor in tail;* and one of the four sisters having issue a son and two daughters living at the death of the testator, at all events they took vested estates in remainder: and whether that son took conjointly with his two sisters in tail, or whether the son would have taken first in tail, with remainder to his two sisters in tail, made no difference in the event, as the son died without issue. And the three other sisters of the devisor, and his niece *S. E.* having all died without issue after the death of the devisor; held that the two surviving daughters of the fourth sister were entitled to all the estate against the devisee of the niece, who was the devisor's heir at law.

Roe d. Wren v. *Clayton.* 6 E. R. 628

45. *A.* by will bequeathed to his wife (besides some other legacies) a leasehold estate at *N.* for her life, and a leasehold estate at *W.* to *B.*; and by his codicil he directed that the bequests to his wife in his will should be in full of all claim she should be entitled to on his real or personal estate, except the estate for life of his wife in the premises at *W.*; held that the wife was not thereby entitled to the estate at *W.*, it being clear that *W.* was put by mistake for *B.*

Skerratt v. *Oakley.* 7 T. R. 492

46. Where two legacies of the same sum are bequeathed to the same person by different instruments, *viz.* one by will, and the other by a codicil, the legatee is entitled to both; unless it appear from the context of the two instruments, or there be some other circumstance, to shew the intention of the testator, that he should take but one.

James v. *Semmens.* 2 H. B. 283

47. One devises to his natural son, and in case of his marriage with certain persons, or his dying without issue, then to his nephew for life, and after his decease, then for amongst *such person and persons*, his and their heirs, &c. *as shall appear and can be proved to be his next of kin, in such proportions as they would, by virtue of the statute of distributions, have been entitled to his personal estate if he had died intestate:* held, that the distribution was to be made amongst those who were the testator's next of kin *at the time of his death*, though the nephew, to whom a prior life-estate was given, were one of them.

Doe d. Garner v. *Lawson.* 3 E. R. 278

48. By a bequest of leasehold to *R. until his* (eldest) *son* T. *shall attain* 21, *and no longer;* but *in case* T. *shall die in minority, then to* J. *or* O. (his younger brothers) or either surviving or attaining 21, as aforesaid; with a desire that *R.* would *quit and deliver up the premises as aforesaid*, and *confirming* the bequest of them to *R.*'s family on his relinquishment of a certain claim, which he did relinquish: held that *T.*, on his attaining 21, took the estate by necessary implication; though there were a devise of the residue to *N.* the younger brother of *R.*

Goodright v. *Hoskins.* 9 E. R. 306

49. Under a devise of seven different estates to a sister, brothers, and nephews, respectively, one to each stock; including, as to six of the estates, three several lives in succession on each estate; and as to the seventh (which in the first instance was only limited to two persons for life in succession), giving those two a power "to add another life or lives to make three, in like manner as after-mentioned for other persons to do the same;" and then giving this general power, "that *when and so often* as the lives on either of the estates be-

fore given shall be *by death reduced to two*, that then it shall be in the power of the person or persons then enjoying the said estate or estates to *renew* the same with the person or persons to whom the reversion thereof shall belong, by adding a third life in such estate, and paying such reversioner two years' purchase for such renewal; and also to *exchange* either of the said two lives on payment of one year's purchase:" held that the power of renewal only authorized the addition of one life to the three on each estate, and of making one exchange of a life. *Doe d. Hardwicke* v. *Hardwicke*. 10 E. R. 549

49. *Parol evidence* may be admitted to explain a latent ambiguity in a will, or codicil.
Thomas d. Evans v. *Thomas*. 6 T. R. 671
Walpole (L.) v. *Cholmondeley (E.)* 7 T. R. 138

50. Where the devisor made one will in 1752, and another in 1756, without disposing of his personalty, and by a codicil (reciting that by his *last will dated in* 1752, he had made no disposition of his personalty) disposed of his personalty and appointed executors; it was ruled that there was no latent ambiguity so as to let in parol evidence to shew that the testator intended by the codicil to confirm the will of 1756, and not to republish that of 1752. 7 T. R. 138

51. *A.* devised lands to *B.*, and afterwards upon his marriage conveyed them by lease and release to trustees to other uses, with the usual limitations in marriage settlements; on a trial at bar the Court of C. P. refused to admit *parol evidence* to shew that *A.* meant his will to remain in force, unless revoked by the subsequent conveyance. *Goodtitle d. Holford & al.* v. *Otway*. 2 H. B. 516
(See *post* Div. XII. 14.)

52. Parol evidence has been admitted of questions asked by the testator, at the time of executing his will, whether the contents were the same as those of a former will, to which he was answered in the affirmative; in order to set aside the latter will on the ground of fraud. *Doe d. Small & al* v. *Allen*. 8 T. R. 147

53. So evidence may be given to shew that one will was substituted for another. 8 T. R. 147

54. Parol evidence may be admitted to shew that at the time of making a will the devisor gave instructions to the attorney to insert the name of *A.* in the will, when the attorney inserted that of *B.* by mistake. 6 T. R. 671

55. But parol evidence of declarations made by the testator before the making of a will cannot be received to contradict the will. 6 T. R. 671

56. If a devise be to *A.* by name, with a description annexed not applicable to *A.*, but shewn by parol evidence to be applicable to *B.*, so that it is uncertain which of them was intended, the devise is void, and the heir at law shall take; and no parol evidence can be admitted to shew, that previous to the making of his will, the devisor had declared that he meant to leave the premises to *A. Thomas d. Evans* v. *Thomas*. 6 T. R. 671

57. But if the description annexed to *A.*'s name be not applicable to any other person, it may be rejected as surplusage; and then *A.* will take under the devise. 6 T. R. 671

58. Parol evidence may be admitted to shew that the name of *A.* was inserted by mistake for the name of *B.* *ib.*

59. *A.* devised his estate at *Lushill* in the county of *Wilts*, and *Hearne* and *Buckland* in the county of *Kent*, "to his son in fee;" at the time of the devise *A.* had lands in the parish of *Hearne*, and also in the several parishes of *C. W. S. R.* and *S.* all which he purchased by one contract of one person, and used to call his "*Hearne* estate," or "*Hearne-Bay* estate;" the estate at *Lushill* in *Wilts*, and also a farm called *Buckland* Farm in *Kent*, were sold before the testator's death, and at the time of his death he had no estate in *Kent*, except that which lay in the parishes of *Hearne*, *C. W. S. R.* and *S.*: *Qu.* Whether the above facts were admissible in evidence to shew that the testator intended to pass the land in the several parishes of *C. W. S. R.* and *S.* as well as that in the parish of *Hearne*?
Whitbread v. *May*. 2 B. & P. 593

60. Upon a devise to the testator's wife of all his wines, &c. for house-keeping, *in addition* to the *settlement* he had made her upon his *copyhold* estate; and to his niece *M.* the rents and profits of his new inclosed *freehold* cow pasture close in *North Collingham*, during the life of his wife; and to two nephews all his *personal* estate, to be divided between certain nephews and

nieces, and their sons and daughters: and *after the decease of his wife*, he devised to the same two nephews all his furniture, plate, &c. and *all his* COPYHOLD *estates in* North *and* South Collingham," and all other his *personal* estate, to sell and divide amongst his nephews and nieces, &c. including *T. B.*, who, he declared, should be an equal sharer in this division of *his real* and personal estate: the Court of K. B. held that extrinsic evidence could not be given, that the settlement on his wife included a certain *freehold* close, mistakenly there enumerated as one of several *copyhold* closes settled, and which was in fact intermingled with the copyholds: for the purpose of shewing that such *freehold* passed, under the devise as meant to include all his *real* estate *in settlement* upon his wife, for there was no ambiguity on the face of the will, nor any thing appearing on the will to warrant a construction of the word *copyhold* so contrary to its ordinary acceptation as to include the *freehold* in question.

Doe d. Brown v. *Brown.* 11 E. R. 441

III. *Cross Remainders; what Words shall create.*

1. *A.* devised "to all and every the daughter and daughters of the body of *B.*, and the heirs male of the body of such daughter or daughters equally between them, if more than one, as tenants in common; and for default of *such* issue, he devised *all* his said lands to *C.*:" held that the daughters of *B.* took cross remainders.

Atherton v. *Pye.* 4 T. R. 710

2. The rule is, that, as between two only, it shall be presumed that cross remainders were intended to be raised; but if there be more than two, it is necessary to resort to other words in the will to discover an intention to raise them. 4 T. R. 713

3. Wherever it appears to be the intention of a testator that the whole of his estate shall go over together, upon the failure of issue of more than two tenants in common, cross remainders shall be implied between them in the mean time, in order to effectuate that intent.

Doe, d. Gorges, v. *Webb.* 1 W. P. T. 234

4. Under a limitation (after estates for life to *A.* and *B.* of "all and every the said premises to all and every the younger children of *B.* begotten or to be begotten, if more than one equally to be divided amongst them, and to the heirs of their *respective* body and bodies as tenants in common, &c. and if only one child, then to such only child, and to the heirs of his or her body issuing; and *for want of such issue*," "(a devise of) *the said premises* to *C. N.*, &c. with several limitations over);" "and for want of such issue," then the testator divided *the said premises* between several branches of his family: Held that cross remainders were to be implied between the younger children of *B.* from the apparent intention of the testator from the whole of the will, notwithstanding the use of the word *respective* in such devise.

Watson v. *Foxon.* 2 E. R. 36

5. A devise by *A.* (having three sons and seven daughters) to his sons in succession for life, remainder to the heirs male of their bodies, remainder to the heirs female of their bodies, remainder to all and every his daughter and daughters (if two or more) as tenants in common, and to the heirs of her and their bodies, remainder to the heirs of the devisor's brother; gives cross remainders to the daughters. Between more than two the presumption is against cross remainders; but this may be controlled by a plain intention to the contrary. *Doe.* v. *Barville*, *E.* 13 *G.* 3 *cited. ib.* 47

IV. *Estate in Fee; what Words shall give.*

1. The word "*estate*" of itself carries a fee: and words of restraint must be added to make it carry less.

1 T. R. 411

2. The word "*estates*" is equivalent to "*estate*," and will carry the fee, unless coupled with other words which shew a different intention.

Fletcher v. *Smiton.* 2 T. R. 656

3. Where the testator "gave and bequeathed to *A.* his estate at *B.* and the rest of his effects, furniture, estates real and personal, to *C.*:" *A.* took the estate at *B.* in fee. *Holdfast d.* *Cowper* v. *Marten.* 1 T. R. 411

4. Under a devise by the testator "of all my *estate, lands, &c.* known and called by the name of the coal yard in the parish of St. Giles's London. "The Court of K. B. held that the fee passed. *Roe d. Childet Ux* v. *Wright.* 7 E. R. 259

5. *Qu.*—Whether in a devise the words "estate of what kind soever," immediately preceded and followed by particular descriptions of personal property, will pass a remainder in fee in lands?
Dally v. *King* 1 H. B. 1

6. In a subsequent case a devise of "all the rest and residue of my *estate*, of what nature or kind soever," was held by the Court of C. P. to include real as well as personal property, though accompanied with limitations peculiarly applicable, and usually applied, to personal property alone.
Doe d. Burkitt & Ux & al v. *Chapman.* 1 H. B. 223

7. Where a testator, after directing his debts and funeral expenses to be paid by his executors, and making several bequests of annuities and money, gave to his five grandchildren, whom he appointed executors, "all the remainder of my property whatsoever and wheresoever, to be divided equally, share and share alike, after their paying and discharging the before mentioned annuities, legacies, and demands, or any I may hereafter make by codicil to this my will; all my goods, stocks, bills, bonds, book-debts, and securities in the *Witham* drainage in *Lincolnshire*, and funded property:" the Court of C. P. held that his real estate did not pass under the residuary clause.
Roe d. Helling v *Yeud.* 2 N. R. 214

8. *A.* by his will, the first words of which were, "as to such worldly estate as God has pleased to bless me with," made a provision for his heir at law, and devised "all the rest and residue of his goods and chattels, rights, credits, personal and *testamentary estate* whatsoever to *B.* for his own use, benefit, and disposal;" under this clause *B.* was held by the Court of C. P. to take an estate in fee in the lands of the testator. *Smith & al.* v. *Coffin & Ux.* 2 H. B. 444

9. After introductory words, "as touching" the testator's "worldly *estate*," &c. he devised a cottage house, &c. to *A.* and his heirs, and also gave to *B.*, whom he made his executrix, "all and singular his lands, messuages, and tenements, *by her freely to be possessed and enjoyed*;" the Court of K. B. held that the latter words, being ambiguous, did not pass the fee against the heir; but might mean free of incumbrances, or dispunishable of waste; and that the word *estate*, in the introductory clause, could not be brought down into the latter distinct clause.
Goodright, d. Drewry, v. *Barron.* 11 E. R. 220

10. A devise to the testator's wife, of "all his property both personal and real for ever," passes the fee in the real estate: and the devisor's intent to use the words in a more restricted sense is not shewn by a subsequent clause of the will, whereby, *after her decease*, he gave *an additional annuity* to a person to whom he had before given a smaller annuity preceding the devise to the wife. *Doe d. Dacre (Lady)* v. *Roper.* 11 E. R. 518

11. A devise of testator's lands at *W.*, and *all his interest in the estate of J. C.* deceased, to *L. A.* for life, and after *L. A.*'s decease to *E. S.*, charged with an annuity to *J. T.* for life, gives a remainder in fee to *E. S.*
Andrew v. *Southouse.* 5 T. R. 292

12. Whether the word "hereditaments" is sufficient to carry a fee? *Qu.*
3 T. R. 360.—5 T. R. 558

13. A devise of all the rest, residue, and remainder of the devisor's lands, hereditaments, goods, chattels, and personal estate, "his legacies and funeral expenses being *thereout* paid," conveys the fee of all the devisor's real estate.
Doe d. Palmer v. *Richards*, 3 T. R. 356

14. In a subsequent case the Court of K. B.; held that only an estate for life passed by these words: "all the *rest* of my lands, tenements, and *hereditaments*, either freehold or copyhold, and also all my goods, &c. *after payment of my just debts and funeral expenses I give* and bequeath *the same* to *A.*" &c. *Denn d. Moor* v. *Mellor.* 5 T. R. 558—(The judgment of the court in this case was reversed in *Cam. Scac.* on the ground that there was a clear intent to convey the fee.
3 *Anst.* 781. 1 B. & P. 558
(See 6 T. R. 175.—8 T. R. 503)
This judgment of reversal was however reversed in *Dom. Proc.* and the judgment of K. B. affirmed, 7 July 1800. 2 B. & P. 247. 7 Par. Ca. 8vo. tit. WILL.

15. Two being seized of undivided moieties, as tenants in common, in fee, quere whether a devise by the one of *his half part* to the other will carry

the fee? But at any rate the fee did not pass by a residuary clause, whereby the testator, after several pecuniary bequests, *ordered* the lease of his house with his furniture, to be sold, and *all the rest and residue* to be divided amongst other persons; and appointed executors: for such division of the *rest and residue* must be intended to be made *by the executors* as such, and therefore confined to *personal* property. *Bebb* v. *Penoyre & al.* 11 E.R. 160

16. A devise of "all the rest I have in the world, both, houses, lands, goods, and chattels, &c. to my wife, my executrix; *so that* she shall sell my stock in trade and household goods, and *if* these will not pay the debts, she shall sell next the house in fee in *Penzance*, &c.; *so that* my executrix shall pay in good time all lawful debts," &c.: held to carry the fee of the house in *P.* to the executrix; she being charged personally with the payment of debts, in respect of the real as well personal estate devised. And the postponement of the sale of the realty till after the personal estate was exhausted being merely recommendatory to her. *Goodtitle d. Paddy* v. *Maddern.* 4 E.R. 496

17. The distinction turns, in respect to carrying the fee, on this, whether the debts, &c. are merely a charge on the estate devised, or a charge on the devisee himself in respect of such estate in his hands. *ib.*

18 One devised thus; "Concerning my worldly estate, I give and bequeath to *M. M.* 1*s.* *Also I give and bequeath* to *A. M.* 2*s.*" (with pecuniary bequests to several others in the same form of words); "*also I give and bequeath* to *G. S.* my messuage and lands, &c. in *W. also I give and bequeath* to the said *G. S.* and his wife all my lands, &c. in *B. also* all my messuages, &c. in *W.* *Also* all my goods, chattels, &c. and personal estate, *after having thereout first paid and discharged* all my *debts and funeral expenses: also subject to the payment thereout all the aforesaid legacies.* And I nominate the said *G. S.* to be *sole executor, whom I charge* with the payment of my debts, legacies, and funeral expenses," &c.; held that *G. S.* and his wife took a fee in the estate devised to them, by reason of the words "*having thereout first paid all my debts,*" &c. which was a *personal* charge on them in respect of the realty as well as personalty, all devised in one entire sentence, together with such charge. *Doe d. Stevens & Pain* v. *Snelling.* 5 E.R. 87

19. One seised in fee, having only one daughter *A.* married to *N. B.*, and two grandsons, *W. T. B.* and *M. B.* devised, "as for my worldly and temporal estates, &c. I give to *N. B.* 1*s.*; and devised that *he shall not come upon my premises or hereditaments on any account whatsoever.* Then after giving a legacy to his grandson *M. B.*, he devised to his daughter 20*l. a year out of the profits of his estate or lands at* Eton;" and then devised to his grandson *W. T. B.* "all his messuage and dwelling-house situate at *Eton* aforesaid, with all hereditaments, &c. thereunto belonging, &c.; and that *W. T. B.*, when 21, shall enter upon and enjoy *the above mentioned estates*, situate at *Eton* aforesaid; held, that in order to effectuate the intention of the devisor to exclude, at all events, his son-in-law *N. B.* from *coming upon his premises*, &c. (which he would otherwise be entitled to do as tenant by the curtesy, if his son *W. T. B.* died before his mother); *W. T. B.* took a fee. But held that the annuity devised to his daughter *A. out of the profits of the estate*, being no charge upon the *devise* or upon the *estate given to him*, would not have passed the fee to *W. T. B.*; *Doe d. Bates* v. *Clayton.* 8 E. R. 141

20. Testator, after a general introductory clause "as to his worldly estate," devised to his wife during her natural life all his houses in *Swan Lane*; he then devised several houses, without words of inheritance, to his sons *T. B.* and *S. B.*, and after the death of his wife he gave to his son *W. B.* all those his three houses or tenements in *Swan Lane*, in the tenure or occupation of *A. B.* and *C.*; he likewise gave several legacies to be paid within six months after his death, and concluded thus: "and I charge all my estates both real and personal with the payment of the above or afore mentioned legacies, and I appoint my beloved wife and my son *T. B.*, my son *S. B.*, and my son *W. B.*, executors of this my will, and after my just debts and funeral expenses are paid, then the surplus of my effects, both real and personal, to be equally divided to my executors which shall be then living. The Court of C. P. held that *W. B.* only took an estate for life under the devise of the

three houses in *Swan Lane* after the death of his mother, notwithstanding the words of charge, &c.; but that he took a fee in one-fourth part under the residuary clause.

Doe d. Briscoe & al. v. *Clarke*. 2 N. R. 343

21. *J. S.* devised thus, "as to what real and personal estate it has pleased God to bless me with (all my debts, &c. being first paid out of my personal, and if that is not sufficient, out of my real estate), I give and dispose of the same as follows; I devise all my messuages lands, tenements, and *hereditaments* in *S.*, *&c.* to *A.*:" the Court of K. B. held that *A.* took only a life estate.

Doe d. Small & al. v. *Allen*. 8 T. R. 497

22. *A.* devised his real and personal estates to his wife for life, and directed part of the personalty to be sold after his wife's death by the executor, and divided between *C. D.*, *E.*, *F.*, and *G.*; he then gave *two annuities to H. and J. to be paid by his executor out of his whole estate*, and to commence after his wife's death, and after the yearly payments to the annuitants *out of his whole estate* to *B.*, *C.*, and *D.*, equally share and share alike; held that the executor took a fee.

Doe d. Beezley v. *Woodhouse*. 4 T. R. 89

23. Under a devise of land to the two children of the testator's brother *W.*, when they attained the age of 21 years; but the executor to account to them for the profits until the age of 21, or day of marriage: but *if either should die before* 21, the survivor to be *heir* to the other: the Court of K. B. held that the fee passed, which would go over to the survivor in case one died under 21, and would descend or be disposeable if he died after attaining 21: and that a devise of other land to the two children of another brother *R. on the same condition as W.'s children*, was governed by the same construction.

Doe d. Wight v. *Cundall*. 9 E. R. 400

24. Where an estate in fee is devised to trustees in trust for *A. B.* without any limitation of the estate to the *cestuique trust*, the latter takes the beneficial interest in fee.

Challenger v. *Shepherd & al.* 8 T. R. 597

25. A devise of a house to *A.*, "paying yearly and every year out of the said house the sum of 15*s.* to *B.*" will carry a fee. *Goodright d. Baker* v. *Stocker*. 5 T. R. 13

26. Under this devise "I give my freehold house and furniture to *A.*, whom I make executrix, *she paying all my debts and legacies*; I likewise leave to *A.* all the rest of my personal estate;" *A.* takes a fee in the freehold.

Doe d. Willey & al. v. *Holmes*. 8 T. R. 1

27. *A.* devised a house to his mother for life, and after her death "to the eldest son of *E. K.*, and if *E. K.* should have no male heir, then to the eldest son of *J. K.*" He also devised copyhold lands "to the eldest son of *E. K.*, but if the said *E. K.* should have no male heir, then my will is that the aforesaid lands and tenements I bequeath to the aforesaid son of *J. K.*, to him and his heirs for ever." But if the said eldest son should offer to sell or mortgage such copyhold lands and tenements aforesaid, then he gave the aforesaid lands and tenements to *T. C.* in fee. He then gave his personal estate to *T. C.*, directing him "to be at the charges of taking up and admitting the said eldest son as aforementioned to the said copyholds out of the said personal estate, and in the name of the said *K.*" He then gave the rents and profits of the copyholds to *T. C.* for seven years, and then "to the aforementioned eldest son. But if the said *T. C.* should die before the end of the seven years, then the aforesaid eldest son of the *K.*'s to to take and enjoy the said estate forthwith to them and their heirs for ever." The Court of C. P. held that the eldest son of *E. K.* took an estate in fee under this will in the copyhold premises.

Wright v. *Bond*. 2 N. R. 125

28. One, having entered into articles of agreement for the purchase of certain premises, devised the same to a trustee to pay the rents and profits to her three daughters (one of them being covert) and the survivor of them, for their lives, share and share alike: and, after their decease, in trust for all and every the *child and children* of her three daughters who should be living at the death of the survivor of them, as tenants in common: but if all her daughters should die without leaving any *issue*, then, after the decease of the survivor, in trust for her grandson, in fee, who was her *heir at law*: the residue of her real and personal estate to her three daughters. Upon a bill filed by the grandson, in

the lifetime of the surviving daughter, to restrain the tenant from cutting timber, &c.; and after a conveyance of the premises to the uses of the will; the Court of K. B. held that under the will and deeds of lease and release the three daughters took no legal estates, but that the releasee took an estate for the lives of the daughters; and that such of their children as should be living at the death of the survivor of the daughters would take estates *in fee*, as tenants in common.

Robinson v. *Grey and Others*. 9 E. R. 1

V. *Estate Tail.*

1. Under a devise "to *A.* for life, and after his decease *to and amongst his issue, and in default of issue,*" then over, *A* takes an estate-tail.

Doe d. Blandford v. *Applin*. 4 T. R. 82

2. Under a devise to *A.* of all the testator's whole estate and effects, real and personal, *&c.* "who shall hold and enjoy the same as a place of inheritance to her and her children, or her issue for ever. And if it should happen that *A.* should die, leaving no child or children, or *A.*'s children should die without issue," then over: held, that *A.* took an estate tail.

Wood & Ux. v. *Baron*. 1 E. R. 259

3. Testator devised "*all* his freehold leasehold, *&c.* estates" to *A.* in fee; provided that if *B.* should have "any son or sons," then "to such male issue as *B.* shall have when *A.* attains 21," but *A.* to have the rents and profits of the estates till he attains 21; by a subsequent clause he gave "all the residue of his real and personal estates whatsoever, not before disposed of, to *A.*, his heirs, *&c.* for ever;" *B.* had one son, who died before *A.* attained 21, and a second who was born three weeks after that period; held that the first son took nothing, but that the second took an estate in tail male. *Whitelock & al.* v. *Heddon & al.* 1 B. & P. 243

4. By a devise to *A.* for life, without impeachment of waste, and after his decease to the issue male of his body, and the heirs and assigns of such issue male for ever, and for default of such issue male to *B.*, *&c.*; *A.* takes an estate tail. *Denn d. Webb* v. *Puckey*. 5 T. R. 299

5. But if in the above case *A.* had taken only an estate for life, yet as the remainder to his issue and the subsequent remainders were contingent, *A.* might have barred them by suffering a recovery before issue born. 5 T. R. 299

6. Under a devise to *A.* for life without impeachment of waste, remainder to his eldest son lawfully to be begotten, and the heirs of such son, and *in default of issue male of A.* then to *B.*, *&c.*, *A.* takes an estate for life; remainder to himself in tail: and though *A.* could not bar the estate tail to his eldest son, yet he may suffer a recovery, and by coming in as a vouchee under a double voucher, may bar all the remainders over.

Dee d. Bean v. *Hatley*. 8 T. R. 5

7. Under a devise to *A.* for life, *without impeachment of waste* and *with a power of jointuring*; remainder to the issue male of *A.*'s body and their heirs: and *in default of such issue* to *B.* for life, without impeachment of waste and with power of jointuring; remainder to the issue male of *B.*'s body and their heirs for ever: with a proviso, that in case *A.* or *B.* should become possessed of any other estate, and be obliged to change his name, that he should have the option which to take, but not to take both estates, but that one of his estates should go to the other of his nephews; remainder and residue of the testator's estate to *A.* in fee: held *A.* who had no child till after the death of the testator, took an estate tail under the first devise, and that a recovery suffered by him after the birth of a son was good.

Frank v. *Stovin*. 3 E. R. 548

8. *A.* devised all his estates in the county of *D.* to a trustee for 200 years, to the use of the trustee during the life of his son *J. S.* to preserve contingent remainders, nevertheless to permit *J. S.* to receive the rents and profits; and after his decease to the use of the first son of the said *J. S.* to be begotten on the body of the woman he should happen to marry, and the heirs male of such first son, and for want of such issue to the use of the second, third, fourth, and every other son of *J. S.* and the heirs male of their bodies in succession, and for want of such issue male, then to the use of his daughter *E. S.* her heirs and assigns for ever; the testator afterwards made a codicil whereby he devised all his estate to his son *J. S.* and his children lawfully to be begotten, with power for him to settle the same by will or otherwise on

such of them as he should think proper, and for default of such issue, then to his daughter *E. S.* and her children lawfully to be begotten with a similar power, and in default of such issue to *J. S.* and *E. S.* equally between them; and he further provided that a settlement of 200*l. per annum* should be made on any woman whom his son should happen to marry, and that his estates should be chargeable therewith. At the time of making the codicil *J. S.* was married but had no child: held that the codicil was to be construed independent of the will; and that under the codicil *J. S.* took an estate tail, with a power to settle the estates on all or any of his issue in such way as he should appoint, and thereby determine the estate tail so far as it should be consistent with such settlement.

Seale v. *Baxter.* 2 B. & P. 485

9. Devise to testator's first son by his wife gotten or to be gotten, for life, remainder to trustees to preserve contingent remainders; remainder to the several heirs male of such first son lawfully issuing, so as the elder of such sons and the heirs male of his body should always be preferred and take before the younger and the heirs male of his body; remainder to the testator's second, third, fourth, and all and every other son and sons, for their several and respective lives; remainder to trustees, and to preserve, *&c.*; remainder to the several heirs male of their several and respective bodies lawfully issuing, so as the elder of such sons, and the heirs male of his body, should be always preferred and take before the younger of the same sons, and the heirs male of his and their body and bodies; remainder to the testator's first and other daughters for their lives; remainder to trustees, *&c.*; remainder to the several heirs of their several and respective bodies lawfully issuing, so as the elder of such daughters, and the heirs male of her body, should always be preferred and take before the younger of the same daughters, and the heirs male of her and their body and bodies. There were other clauses in the will, by which, after giving an estate for life to the first taker, the testator limited to trustees, *&c.*; remainder to the first and other sons of such first taker, and the heirs of their bodies, so as the elder of such sons and the heirs of their bodies, should always be preferred before the younger of the same sons, and the heirs male of their bodies: held that the first son of the testator took an estate tail.

Poole v. *Poole.* 3 B. & P. 620

10. *A.* devised to his nephew *B.*, but if he died without male heir, then to another nephew *C.* and his heirs; and charged the estate with an annuity to *D.*, and several legacies to other persons to be paid at a future time: held that *B.* took an estate tail.

Denn d. Slater v. *Slater.* 5 T. R. 335

11. Devise to *A.* and her heirs, and if she died without issue, then she was enabled to dispose of the estate by will or deed, and for want of such issue and direction, *&c.* then to the devisor's right heirs; held that *A.*, who had issue, took an estate tail.

Doe d. Neville v. *Rivers.* 7 T. R. 276

12. Devise 'to *A.* and *B.* and their heirs for ever, provided that if both have issue then both their dividends to go to the issue of their own bodies; but if but one have issue, then the premises to go to that issue; and for default of such issue in both, to the right heir at law:' held that *A.* and *B.* took estates tail. *Doe d. Gregory & d. Geere* v. *Whichelo.* 8 T. R. 211

13. Under a devise "to *A.* and *B.* and their heirs, and in case they agreed to sell the estate, that they should have their equal shares of the money arising therefrom, but if they agreed to keep the estate whole together, then that the rents should be equally paid and divided between them, and to the several and respective heirs of their bodies;" *A.* and *B.* took only estates tail. *Roe d. James* v. *Avis.* 4 T. R. 605

14. Under a devise to *A.* and the heirs of her body for ever, as tenants in common and not as joint-tenants; and in case *A.* die before 21, or without leaving issue of her body, then to *B.*: held that *A.* took an estate tail. *Doe d. Chandler* v. *Smith,* 7 T. R. 531

15. Under a devise of land to the testator's son *Joseph*, his *heirs* and *assigns for ever;* but in case his son should *die without issue, then,* to go to the child of which his second wife was enseint: the court of K. B. held, that *Joseph* took an estate tail.

Doe d. Ellis v. *Ellis.* 9 E. R. 382

16. A devise of a messuage and land to *R. C.* for the term only of his natural life, and after his decease to the issue of the said *R. C.* as tenants in com

mon; but in case the said *R. C.* shall die without leaving issue, then a devise of the same to *E. H.* in fee; gives to *R. C.* an estate tail in order to effectuate the general intent. And cross remainders cannot be implied between the issue of *R. C.*

Doe d. Cock v. *Cooper*. 1 E. R. 229

17. Under a devise of all freehold and copyhold estates whatsoever situate at *B.* with their appurtenances, to *A.* and the *heirs of her body* lawfully to be begotten whether *sons and daughters*, as *tenants in common;* and in default of such issue, then over; held that *A.* took an estate tail.

Pierson v. *Vickers*. 5 E. R. 548

18. *A.* after giving different annuities to an only son, increasing at different ages till 30, and to be paid to him until he married, devised thus; "in case my son shall happen to marry before he attains the age of thirty, then I give and devise to him and the heirs of his body all my real and personal estates, *&c.* and if my son shall happen to die without leaving issue of his body, then I give and devise the same to my brother *B.*:" held that the son took an estate tail in the real estates, and the personal estate absolutely.

Daintry v. Daintry. 6 T. R. 307

19. A devise to trustees in trust to receive rents and profits during the life of *A.* and that such rents and profits shall be applied for the subsistence and maintenance of the said *A.* during his life, is not an use executed in *A.* and cannot unite with a subsequent legal limitation to the heirs of the body of *A.* *Silvester* v. *Wilson*. 2 T. R. 444

20. Under a devise to one and *her heirs* (she having two children before, and a third born after making the will,) *during their lives:* held that these latter words were repugnant to the others, and that she took an estate of inheritance.

Doe d. Cotton v. *Stenlake*. 12 E. R. 515.

VI. *Estate for Life.*

1. *A.* devised his estate real and personal, "in trust to trustees for his brother *B.* and his *first and every other son* in tail male; failure of such issue to his brother *C.* and his first and every other son in tail mail, *&c. &c.* in all the foregoing cases without impeachment of waste, other than wilful;" and directed the renewals of a leasehold estate to be made "by the tenant for life;" held that *B.* took only a life estate, with remainder in tail to his children, and that the devisor intended to use the words "first and every other son" as words of purchase.

Doe d. Phipps v. *Ld Mulgrave*. 5. T. R. 320

(See DIV. VIII. 3. *&c.*)

2. Under a devise to *A.* for her natural life, without impeachment of waste, remainder to trustees to preserve contingent remainders, remainder to the *heirs male of the body of* A. to be begotten, severally, successively, and in remainder one after another, according to seniority, *&c.* the elder of *such* sons and the heirs male of his body being always preferred before the younger of *such son and sons*, and the heirs male of their bodies; and in default of such issue, to the *daughter and daughters* of the body of *A.* as tenants in common in tail, remainder over: held *A.* only took an estate for life, and that the words *heirs male of her body* were explained by the subsequent words to mean first and other sons.

Goodtitle d. Sweet v. *Herring*. 1 E. R. 264

3. The words *heirs male of the body* may be construed to be words of purchase, if they are clearly so intended to be.

ib.

4. Under a devise "to *A.* for life, and after him to his eldest or any other son after him for life, and after them to as many of his descendants issue male as shall be heirs of his or their bodies down to the tenth generation, during their natural lives:" held that *A.* took no more than a life estate; for here is no *general* intent to create an estate tail, as contra-distinguished from the *particular* intent to give an estate for life to the first taker; but a single intent to create a succession of life estates to persons not *in esse*, which the law will not allow.

Seaward v. *Willock*. 5 E. R. 198

5. *A.* devised two houses to his wife for life, and willed that on payment of a sum of money to the wife by *B.* (one of his sons) *B.* should share equally alike with the rest of his brothers and sisters *C.*, *D.*, and *E.*; and if any of his children should die, then the share of him or her should go amongst the survivors: held that the children *B.*, *C.*, *D.*, and *E.* took only estates for life under the will.

Goodtitle d. Richardson v. *Edmunds*. 7 T. R. 635

6. Under a devise to "*A.* for life remainder to his first and other sons in tail male, remainder to the use of all and every the daughters, &c. as tenants in common, and *in default of such issue*, to the use of the right heirs of the devisor," an only daughter took only an estate for life on the death of *A.* without a son.

Hay v. *the Earl of Coventry*. 3 T.R. 83

7. By a devise to *S. Nash*, son of *T.* and *M. Nash* for life, remainder to trustees, &c. remainder to the first and other sons of *S. Nash*, and the heirs male of his and their bodies respectively, and for default of such issue, to the use of all and every the *daughter and daughters* of the said *T. Nash*, on the body of the said *M.* his wife begotten and to be begotten, and *for default of such issue*, to the use of the right heirs of the said *T. Nash* for ever; a daughter of *T. Nash* only took an estate for life.

Denn d. Briddon v. *Page*. 3 T. R. 87

8. A testator devised one of three estates to trustees and their heirs, until his nephew *Thomas*, son of his brother *William*, should attain 21 or die; and on his attaining 21, to the said *Thomas* for life sans waste; and after the determination of that estate, to the trustees during *Thomas*'s life to preserve contingent remainders, &c.; and after the decease of *Thomas*, to all and every *the son and sons* of the body of *Thomas*, *severally and successively* one after another, in priority of birth, &c.; and *for default of* SUCH *issue*, to the trustees until his nephew *John*, son of his brother *Samuel*, should attain 21 or die; and in case *John* attained 21, then to him for life, sans waste; and after the determination of that estate, to the trustees, during *John*'s life, to preserve contingent remainders; and after his decease, to all and every the son and sons of the body of *John*, severally and successively one after another, in priority of birth, &c.; and after the determination of that estate (or, as it stood here in the limitation of one of the other estates "and for default of *such* issue,") to the trustees, until his nephew *S. W.* should attain 21 or die, &c.; and so repeating all the former limitations as to *S. W.* and his sons; and the like with respect to a fourth nephew, *F. W.* and his sons; concluding—and *for default of* SUCH *issue*, to the testator's brother *Joseph* for life, sans waste; and after his death, to his son *Joseph* and his heirs. The testator repeated the same set of limitations twice more, with respect to the two other estates, only varying the priority of his nephews; but concluding after each set of limitations with the same devises to his brother *Joseph* for life, and to *Joseph*'s son in fee.

The nephew, *Thomas* (the heir at law) and *S. W.* had issue male after the testator's death, but none of the nephews had any son born during the testator's lifetime. The court of K. B. held that the four first-mentioned nephews and their sons only took estates for life respectively; the words, "*for default of* SUCH *issue*," meaning for default of *son or sons*, &c.

Foster &al. v. *Ld. Romney*. 11 E. R. 594

9. A testator devised one estate to his wife for life, and after her decease to his daughter *Mary* and the *heirs of her body* begotten or to be begotten, *as tenants in common*, and not as joint tenants; but if such issue should die before he, she, or they, attained 21, then to his son *Joseph* in fee: and then he devised another estate to his wife for life, remainder to his son *Joseph* and to the *heirs of his body* begotten or to be begotten; but if he died without issue, or such issue all died before attaining 21, then to his daughter *Mary* and *the heirs of her body* begotten or to be begotten; such issue, if more than one, to take *as tenants in common*: The Court of K. B. held that the daughter *Mary* only took an estate for life in the first estate, with remainder to all her children equally as purchasers.

Doe d. Strong &al. v. *Goff*. 11 E.R. 668

10. *A.* devised to *B.* preacher of the meeting-house of *C.* for life, on condition that he should convey the premises to trustees, to take place after *B.*'s death, for the use and support of the preaching the word of God at the meeting-house for ever, and in case the preaching there should be discontinued, then over to a charity-school; held that *B.* took an estate for life, though the devise over after his death though the devise over after his death would be void by stat. 9 *G.* 2 c. 36.

Doe d. Phillips v. *Aldridge*. 4 T.R. 264

11. A devise to trustees of a reversion in land (after payment of debts, &c which were found to be paid) to be applied by them and their successors, and the officiating ministers for the time being of a methodist congregation, as they should from time to time think fit to apply the same, is not a devise to charitable uses within the stat. 9 G. 2. c. 36, and therefore held, that the trustees were entitled to recover at law, however the Court of Chancery might afterwards direct the application of the trust fund.
Doe d. Toone v. *Copestake*. 6 E. R. 328

12. One devises all his freehold estate to his wife during her natural life, "and "also at her disposal afterwards to "*leave* it to whom she pleases:" held that this only gave her a power to *leave* it *by will*; and therefore that a disposition of it by feoffment in her lifetime was void. *Doe d. Thorley* v. *Thorley* 10 E. R. 438

VII. *Femmes Covert; Devises in favour of.*

1. *A.* devised lands in trust to pay the rents and profits to his daughter, (whose husband was then living) for her life, notwithstanding her coverture, and *not to be subject to any control*, &c. *of her husband*, nor liable to any debts which he *had* or *should contract*; afterwards the devisor made a codicil, taking notice of the death of his daughter's husband, wherein he ratified and confirmed his said will: the daughter is entitled under this devise to the rents and profits, &c. free from the control of any *future* husband. *Beable* v. *Dodd*. 1 T. R. 193

2. A devise of lands to trustees and their heirs upon trust to permit a femme covert to receive and take the rents and profits during her life, for her sole and separate use, and after her decease to the use of the first and other sons of her body, then to the daughters as tenants in common, with other like limitations to other femmes covert, vests the legal estate in the trustees.
Harton v. *Harton*. 7 T. R. 652

3. Under a devise in trust to pay unto, or else to permit and suffer the testator's niece (a femme covert) to receive the rents: the Court of C. P. held that the legal estate was executed in the niece, because the words "to permit" came last; and in a deed the first, in a will the last, words prevail.
Doe d. Leicester & al. v. 2 W. P. T. 109

VIII. *Limitation of real Estate.*

1. Where the person to whose right heirs an estate is limited takes no estate himself, there his right heirs shall take as purchasers. 1 T. R. 634

2. A devise to the right heirs of husband and wife is a devise to such person as answers the description of heir to both, namely, *a child to both*; and if no preceding estate be given to the father and mother, such child shall take as a purchaser. *Roe d. Nightingale* v. *Quarterley* 1 T. R. 630

3. *Issue* is either a word of purchase or limitation, as will best effectuate the devisor's intention. *Doe* v. *Collis* 4 T. R. 492

4. Therefore where *A.* devised his estate to his two daughters, to be equally divided between them, one moiety to one and her heirs, and the other moiety to the other for life, and after her decease, *to the issue of her body and their heirs for ever*, and she had one child living at the time of the devise, the second took only an estate for life, with remainder to her children as purchasers. 4 T. R. 294

5. The words "first and every other son," may be taken as words of limitation, where it manifestly appears that the devisor intended to use them in that sense; but, generally speaking, they are words of purchase.
5 T. R. 323. See DIV. VI. 1.

6. *A.* by will devised to trustees to the use of *B.* for life, remainder to trustees, &c. remainder to the first and other sons of *B.*, remainder to the daughters of *B.*, remainder to the use of such person as he shall appoint by deed; and afterwards by a deed, in which he recited the will, he appointed the same premises after the death of *B.* and failure of her issue to the use of the first and other sons of *C.*, &c. *B.* afterwards died without issue; held that the limitations created by the will and the deed could not be united; and that the limitation in the latter to the first and other sons of *C.*, &c. was too remote to take effect, being after a general failure of issue of *B. Habergham* v. *Vincent*. 5 T. R. 92

7. After a devise to an infant *in ventre sa mere* for life in case it should be a son, remainder to such issue male or the descendants of such issue male of such child as at the time of his death should be his heir at law, and in case at the time of the death of such child there should be no such issue male nor

any descendants of such issue male then living, or in case such child should not be a son, then over; the limitation over is not too remote to take effect.

Long v. *Blackhall.* 7 T. R. 100 (See *ante* l. 16.)

8. Under a devise of lands to trustees in fee in trust for *A.* (an infant) for ninety-nine years if he shall so long live, and after that term to his first, second, third, and fourth sons, and the issue male of their bodies, for the like term of 99 years, as they shall be in seniority of birth; and in default of such issue male in him or them, then to *B.* and the issue male of his body for the like term of 99 years; and in default of such issue male, then to the right heirs of the devisor. *A.* takes an estate for 99 years determinable with his life, and upon his death his first son takes a like estate; but the subsequent limitations to his other sons, and to *B.*, are void.

Somerville v. *Lethbridge.* 6 T. R. 213

9. Under a devise to the testatrix's daughter *E.* for life, remainder to her children and their heirs for ever; but in case *E.* die without leaving any issue of her body, then to certain other grandchildren, by other daughters, equally to be divided between them, share and share alike, as tenants in common: but in case of the death of either of her grandchildren, *under age, and without leaving any issue,* the share of him or her so dying should be for the benefit of the survivors of the respective family, &c. Held that the grandchildren took a fee in their respective shares, by reason of the devise over on their dying *under age;* with an executory devise over, if any of them died under 21, and without leaving issue *at the time of their respective deaths;* and therefore the limitation over was not too remote.

Toovey v. *Bassett.* 10 E. R. 460

10. Under a devise to *H.* of certain tenements by name for her life; provided that if *S.* and *A.* (to whom and to whose children the reversion and inheritance of the premises were intended if *H.* should die without issue) should give *H.* 1000*l.* for her life estate, then the testator devised all and singular the said estate and premises called &c. to *S.* and *A.* for their lives, share and share alike; and on the death of either, their moiety unto and among the children of the survivor and their heirs, share and share alike, &c. as tenants in common, &c. provided that if *H.* should *die in possession of the premises* single and without issue, then he gave the said estate and premises *to S. and A., and to the issue of their bodies lawfully begotton, or to be begotten, and their heirs, as tenants in common, as aforesaid;* held that the words *as aforesaid* drew down to the second clause the limitations of the first, and shewed that the testator meant that *S.* and *A.* and their children should take the same estates on *H.* dying in possession without issue as they would have done if the 1000*l.* had been paid. And held also, that a younger child of *A.* born after the death of the testators, and before the death of *H.* and *S.* (who died without issue) was entitled to share in the moieties both of *S.* and of *A.* and that the eldest son of *A.* was also entitled to share in both moieties, though he died before *A.;* and on his death the share in *S.*'s moiety descended immediately to his next brother and heir at law, as did also his share in *A.*'s moiety, on her death after him.

Meredith v. *Meredith.* 10 E. R. 503

11. Where a testator devised all his real estate (except at *S.*) to the head of his family for life; and then to several of the junior branches in succession, to each for life; with remainder to his first and other sons in tail male; with the ultimate remainder to *his own right heirs;* and then devised his estate at *S.* to some by name of the junior branches, but not to all of those to whom he had devised the first estate, and varying the order of succession, to each for life, with remainder to his first and other sons in tail male; and then devised that "for default of such issue," the estate at *S.* should go "to such person and persons, and for such estate and estates, as should *at that time,*" (*i. e.* on the death of the last tenant for life named, without issue male,) and from time to time afterwards, be entitled to the rest of his real estate *by virtue of and under his will:*" held that the ultimate remainder in fee of the estate at *S.* vested *by descent* in the person who was *the testator's heir at the time of his death,* and did not

remain in contingency under the will till the death of the last tenant for life without issue male who was named in the devise of that estate. *Doe d. Cholmondeley* E. v. *Maxey*. 12E.R.589

12. Under a devise of freehold property to *the relations on my side*, all those shall take who would be entitled to personal estate under the stat. of distributions: as well in the maternal, as in the paternal line: and the devise speaks at the time of the testator's death, not at the time of framing the devise. Therefore one who was related in equal degree at the time of making the will, having died before the testator, leaving a son, the son was held not entitled to a share, as a relation. *Doe d. Thwaites* v. *Over*. 1 W.P.T. 263

IX. *Limitation of Personal Estate.*

1. Where there is an express limitation of a chattel by words, which, if applied to a freehold, would create an *express* estate-tail, the whole interest vests absolutely in the first taker; and a limitation over of such a chattel is too remote to take effect.

Doe d. Lyde v. *Lyde*. 1 T. R. 596

2. But where there is no such express legal limitation, the court will consider the meaning of the testator.

1 T. R. 596

3. So that where a term was bequeathed "to *G. L.* for life, and after his decease to *Margaret* his wife for life, and after the decease of the survivor to the children of *G. L. share and share alike*, and if *G. L.* died without issue of his body, then to *R. L.* for life, and after his decease to *Mary* his wife for life, with remainders over," the limitation to *Mary* was held good, *G. L.* dying without leaving issue, and *R. L.* dying during his life. 1 T. R. 596

4. If a term be bequeathed to "*A.* and his lawful heirs, and if he die and leave no lawful heirs, than to *B.*" the limitation to *B.* is good. *Goodtitle d. Peake* v. *Pegden*. 2 T. R. 720

5. Under a bequest of a term of years "to *A.* and the heirs of his body and to their heirs and assigns for ever, but in default of such issue, then after his decease to *B.* and his heirs," the limitation over to *B.* is good by way of executory devise.

Wilkinson v. *South*. 7 T. R. 555

6. There seems no difference in the construction of the words "dying without issue," or words to that effect, when applied to *real* or *personal* property. *Porter* v. *Bradley*. 3 T. R. 146

X. *Reversion; by what Words it shall pass.*

1. A possibility coupled with an interest, *e. g.* the interest which a person takes by virtue of an executory devise is devisable.

Roe d. Perry v. *Jones & al.* 1 H.B. 30 [Affirmed in *B. R.* 3 T. R. 88.]

2. Where the testator was seised of an undivided moiety of three tenements in *A.*, and also of the reversion in fee, expectant on the death of *J. S.* of the other moiety, and also seised of lands leased on lives in *B.*, and of other lands in possession in *B.*, and of several other lands in *C.*, and devised to *N. P.*, "all that his part, purpart, and portion of and in the tenement called *A.*, and also all his other lands in fee-simple, situate in *B.*, and the reversion and remainder thereof," the whole of the testator's estate in *A.*, whether in possession or reversion, passed to *N. P.*

Doe d. Phillips v. *Phillips*. 1 T. R. 105

3. *A.* being seised in fee-tail of an undivided fourth part of an estate, and entitled to the reversion in fee of another fourth expectant on the determination of an estate-tail, recited that she was entitled to the first, and devised it to *B. C.* in fee; and then directed all the residue and remainder of her estate and effects to be sold as soon as might be after her death, and her funeral expenses to be paid thereout, and the surplus (if any) to be divided between *D.* and *E.*; it was held that the reversion did not pass by these general words.

4 T. R. 605. 3 T. R. 88. 94, 95

4. *A.* by will gave two legacies of 150*l.* each to his son and daughter, to be paid at 21; then he gave all his realty and personalty to his wife for life; and after her death one freehold estate to the son, and another to the daughter; but if either or both of his children should die before the wife, then those *legacies* which were left to them should *return* to the wife; it was held that on the death of the son before his mother, the latter was entitled to the reversion of that freehold estate.

Hardacre v. *Nash*. 5 T. R. 716

5. Under a devise of "a messuage or tenement, buildings, lands, or premises, *now in my own possession; and all other my real estate* whatsoever in *M.* or in any other place," &c. to *A.* for

life; and after her decease a devise of "*the said* messuage or tenement, buildings, lands, *and premises*," to *B.* in fee; held that the word *premises*, used in the devise to *B.*, carried all that was before given to *A.* and was not confined to the premises in the testator's own possession; and consequently that a reversion in fee of another messuage, to which the testator was entitled after the determination of a life in being, in whose possession it was outstanding during his lifetime, passed to the devisee in remainder.

Doe v. *Meakin.* 1 E. R. 456

6. Where one seised in fee of real estate, by her will first made a disposition of her real estate to two persons for life, reserving a rent-charge out of the same, payable first to her uncle for life, which, "together with the repairs during the term, should be considered as *his rent* for the said farm;" and afterwards she proceeded to make a disposition of her personal property, and then bequeathed and *devised* "all the rest, residue, and remainder of her *effects* wheresoever and whatsoever and of what nature, kind, or quality soever (*except* her wearing apparel and plate) to certain nephews and nieces, to be equally divided between them *by her executors*:" held that the reversion in fee in the real estate did not pass by the residuary clause, but descended to the heir at law; although he had a rent-charge devised to him for his life out of the same estate in the hands of the tenants for life.

Camfield v. *Gilbert.* 3 E. R. 516

7. *A.* devised certain estates to *B.* for life, remainder to his sons and daughters in strict settlement, remainder to *C.* for life, remainder to his sons and daughters in like manner, remainder to his own right heirs, and died; *B.* being seized of the above estates as tenant for life, and also entitled to one sixth of the reversion as one of the right heirs of *A.* made his will, whereby he gave to his wife for life all such freehold and copyhold lands as he had purchased, or was seised of in fee-simple or in exchange for other lands in *Kent*; and then after reciting that he had granted a lease for years to *D.* of the lands whereof he was tenant for life under *A.*'s will, declared that in case such persons as should be tenants for life or otherwise of that estate, by virtue of *A.*'s will should not molest *D.* in the possession of the said lands as leased, and at the expiration of the lease should grant a new lease to his (*B.*'s wife) for life, then he devised his lands purchased of *E.* and *F.*, and all lands that he then had or might have a right to, both freehold and copyhold, arising from exchange of land, act of parliament, or otherwise in *Kent*, devised to his wife for her life, to go with and be subject to the same entail as the estates left by *A.* were or might be subject to by virtue of *A.*'s will, to take effect immediately after the decease of his wife, and in such case recommended his wife to give the furniture which belonged to the house on the estates left by *A.* to whomsoever might be living to enjoy it, but in case such persons as should be tenants for life or otherwise by virtue of *A.*'s will should refuse to grant such lease or should disturb *D.*, then he gave to his said wife and her heirs all his freehold and copyhold lands and houses which he had before devised to her for life only, and all the rest and residue of his real estate whatsoever, and all the rest and residue of his personal estate of what nature or kind soever or wheresoever he gave to his said wife and her heirs, executors, administrators, and assigns for ever; *D.* was not molested and a new lease was granted to the wife of *B.* for her life: held that the wife of *B.* was entitled to the one sixth of the reversion under the residuary clause in *B.*'s will

Goodright d. Buckinghamshire (E.) & al. v. *Downshire (Marq.) et Ux.* 2 B. & P. 600

8. *A.* being possessed of lands at *L.* which had been settled on his marriage on himself for life, remainder to his wife for life for her jointure, remainder to the heirs of their bodies, with reversion in fee to himself; and having other lands at *P.* and *Q.* settled to the same uses (except a coppice, part of *Q.*, of which coppice as well as of some other lands he was seised in fee), after the death of his wife, and having only two daughters living, devised to his daughter *J. in tail*, his unsettled estates by name, *and all other* his freehold, copyhold, and leasehold lands which he was possessed of or entitled to, *and which were not settled in jointure on his late wife* (except *the coppice* which directed should always be held with his estate at *P.*), she, his said daugh-

ter, and the heirs of her body *paying out of all* the aforesaid lands a certain annuity unto his other daughter *A. M. for life*; and in case his said daughter *J.* should die and leave no issue, then to his other daughter *A. M. for life* remainder to her children *charged, &c. remainder to his nephew in fee*; held, that the *reversion* of the *settled* lands did not pass.

Goodtitle d. Daniel v. *Miles*. 6E.R.494

9. A remote reversion of a settled estate will pass by the general words of a residuary clause in a will, by which the testator, having before devised certain other real estate in strict settlement, and given annuities for life, to *A. B.* and *C.*; which annuities he charged upon "all and singular his said manors, lands, tenements and hereditaments, &c. not before disposed of:" devised "all and singular his said manors, lands, &c. and other his real estate *so charged with and subject to the said three several annuities as aforesaid:* although one of the annuitants had a prior life estate in the property, the reversion of which was in the testator. For general words in a residuary clause will carry every estate or interest which is not expressly or by necessary implication excluded from its operation; and no intention of the testator to exclude the reversion is necessarily to be implied from the circumstance, that the charge of one of the annuities could not attach upon this reversion, as the other two might; and the clause will be construed *reddendo singula singulis*.

Doe d. Cholmondely, (Earl) v. *Weatherby*. 11 E. R. 322

10. After a devise to one, and her *heirs* of certain lands in *A.* and other devises to the same person her *executors*, &c. of leasehold interest in *B. C.* and *D.* a devise to the same devisee of all the residue of the testator's estate and effects, *real and personal* whatsoever and wheresoever, not before disposed of after payment of debts, legacies, &c. was held to carry a distant reversion in fee in the lands of *B.* the residuary clause being considered large enough to carry the fee as comprehending all the residue of the devisor's real estate and giving it absolutely to the devisee; and the intent of the testator for that purpose not being acknowledged by the former devises to the same devisee. *William d. Hughes et Ux.* v. *Thomas*. 12 E. R. 141

XI. *Vested Interest; what shall be, and when devisable.*

1. An executory devise is transmissible, assignable, descendible, and devisable.

Jones v. *Roe d. Perry, (in error.)* 3 T. R. 88. 94, 95

2. A devise to *M. L.* the testator's daughter for life, remainder to the children of her body begotten and their *heirs*, and *in default thereof to W. L.* the testator's son in fee: *M. L.* died without children after *W. L.*: held *W. L.* took a vested remainder, which was devisable in the life-time of *M. L.* *Ives* v. *Legge, in Chancery*, 1748. 3 T. R. 488, *n.*

3. *A.* having three daughters *B.*, *C.*, and *D*, by will gave a small legacy to *B.* and *C.*, and then gave a leasehold estate to *D.*; "but if she died *without having* child or children," then "to *B.*, and after her, to her child or children;" *D.* had a child who died in her life-time; held that *D.* took the absolute interest in the term, and consequently that she might dispose of it by will.

Weakly d. Knight v. *Rugg*. 7T.R.522

4. A devise to trustees till *A.* shall attain the age of 24, and *when* he shall attain that age to him in fee, gives him a vested interest, which will descend to his heirs though he die before 24.

Doe v. *Lea*. 3 T. R. 41

5. Under a devise to *D. O.* the testator's eldest son, for life, remainder to trustees, &c. remainder to the *first* and other sons of his said eldest son and *their heirs*, and for want of *such issue* to the testator's second son *J. O.*, &c. with like remainders to his first and other sons, and for want of such issue to the testator's own right heirs: held that the first and other sons of *D. O.* the eldest son took estates *tail* in *succession*, and consequently the remainders over vested, and were not contingent and defeated upon the event of *D. O.* having a son, who died in the life-time of *D. O.*; and therefore that *D. O.* having died without any son living at his death, but leaving daughters, a son of *J. O.* was entitled to take in preference to such daughters of his elder brother.

Lewis d. Ormond v. *Walters*. 6E.R.336

6. Testator devised to *A.* for life, and after her death to *B.* for life, and at the decease of *A.* and *B.*, or the survivor, gave all his real estate to *C.* if he should live to attain 21, but in case he should die before that age, and *D.* should survive him, in that case to *D.* if he should live to attain 21, but not otherwise, but in case both *C.* and *D* should die before either of them should attain 21, then to *E.* in fee: held that *C.* took a vested remainder.

Broomfield v. *Crowder & al.* N.R.313

7. Lands, &c. are devised to *B.* for life, and after his decease *to all and every such child and children of B. as shall be living at the time of his decease.* A posthumous child of *B.* shall share equally with those who were born in his lifetime.

Doe d. Clarke v. *Clarke.* 2 H. B. 399

8. An infant in *ventre sa mere*, is considered as born for all purposes which are for his benefit. 2 H. B. 401

9. A mere right of entry (the estate of the remainder-man having been divested by the fine of tenant for life) is not deviseable. *Goodright d. Fowler* v. *Forrester.* 8 E. R. 552

10. Devise to *A.* for life, remainder to testator's children as *B.* shall appoint. The fee simple becomes vested on the testator's death in all his children then living, subject to be devested by the appointment. *Morgan d. Surman* v. *Surman.* 1 W. P. T. 289

XII. *Void, the lapsed, or forfeited for certainty; by Alteration of Circumstances, as Death of Legatees, or Revocation of the Will express or implied.*

1. Where by the dubious use of the word *family* (viz. "brother and sister's *family*,") in a will, the testator having had two sisters, one of whom was dead, leaving children, it could not certainly be collected to what persons he meant to apply it; the devise is void for uncertainty, and the heir at law is entitled to take.

Doe d. Hayter v. *Joinville.* 3 E. R. 172

2. *A.* devised "to *B.* and the heirs of her body, and for default of such issue," then over; *B.* died in the life-time of *A.*, and then *A.* by a codicil confirmed his will; held that the heir of *B.* took nothing, though it appeared that *A.* knew of the death of *B.* and of the birth of her son before he made the codicil.

Doe d. Turner v. *Kett.* 4 T.R. 601

3. The codicil operated as a republication of the will; and then it stood thus: "a devise to *B.* and the heirs of her body;" but *B.* being dead, the devise was void. 4 T. R. 601

4. *A.* gave by will his tenant-right which he held by lease to *A. I.*, *but not to dispose of or sell it;* and *if he refuse to dwell there, or keep it in his own possession*, then that *J. I.* should have his tenant-right of the farm. *A. I.* having borrowed money left the title deeds with his creditor as a security, and confessed a judgment to secure the money; and having also given a judgment to another creditor who issued an execution against him, the sheriff sold the lease to the creditor with whom the deeds were deposited, he paying the debt of the plaintiff in the execution: and *A. I.* having left the premises and ceased to dwell there on the day of the execution, before the sheriff entered: held that *J. I.* the remainderman was entitled to enter, the estate of *A. I.* having determined by such his acts. *Doe d. Bissotson* v. *Hawke.* 2 E. R. 481

5. *A.* by will devised *all his freehold and copyhold lands, &c.* in trust for certain purposes, and afterwards purchased new lands; and then made a codicil, whereby, after reciting that he had devised all his freehold and copyhold to the trustees named, he revoked the same so far as related to two of the trustees named, and devised his *said* lands, *&c.* to the other trustees upon the same trusts, and concluded with declaring the codicil to be part of his will: held that such a republication of the will would not operate to pass the after-purchased lands.

Ly Strathmore v. *Bowes.* 7 T. R. 482

6. Copyhold lands purchased after a will, disposing of all the testator's lands, do not pass by the will.

Spring d. Titcher v. *Biles, M* 23 *G.* 3 B. R. 1 T. R. 435, *n.*

7. *A.* bequeathed money to trustees in trust for *B.* till she should attain 21, and then to pay the same to her, and if *B.* should die under 21, leaving a child or children, then in trust for such child or children; but if *B.* should die under 21, without leaving any child or children, then in trust for *C.*'s three nieces; *B.* attained 21, married, had two children, and died in the life-time of the testatrix; *B.*'s children took nothing by the will.

Doe v. *Brabant.* 4 T. R. 706

8. Devise to *Margaret* (an only child) for life, remainder to the first son of her body, "if living at the time of her death," and the heirs male of such son, and for default of such issue to the second son of her body, "if living at the time of her death," and the heirs male of such second son, *&c.* and for default of such issue male, remainder to *A.*; *Margaret* had one son, who died in her life time, leaving a son; held that *Margaret* took only an estate for life, and that neither her son nor grandson took any estate.
Doe d. Radclyffe v. *Bagshaw.* 6 T. R. 512

9. Marriage, and the birth of a posthumous child amount to an implied revocation of a will of lands made before marriage.
Doe v. *Lancashire.* 5 T. R. 49

10. But the subsequent birth of a child is not of itself sufficient.
Shepherd v. *Shepherd, H.* 1770, *in Doctors' Commons.* 5 T. R. 49. 51, *n.*

11. *A.* by will provided an annuity for *B.* with whom he cohabited, and directed his trustee and executor out of his real estate, *in case he should have any child or children by B.*, to raise 3000*l.* to be paid to and amongst *his said children*, and devised the remainder of his estate over to several of his relatives. Afterwards he married *B.*, and had several children by her: held that such subsequent marriage and births did not revoke his will; the objects having been therein contemplated and provided for.
Kenebel v. *Scrafton.* 2 E. R. 530

12. *Qu.* Whether such implied revocations may be rebutted by evidence of parol declarations of the testator made after the events that he meant his will to stand. *ib.*

13. A deed intended to operate as an appointment of uses, but not sufficient for that purpose, may have the effect of revoking a will, if the party appear to have had that intention.
Shove v. *Pincke.* 5 T. R. 124. 310

14. *A.* seised in fee, agreed by marriage articles to settle two estates, so as to secure his intended wife's jointure, and the portions of younger children, and subject thereto upon his eldest son in strict settlement; he then devised those estates in case he should happen to die without issue, and subject to such jointure as he might make, to trustees, for 500 years upon certain trusts; afterwards by separate deeds of lease and release he conveyed the estates to trustees, and their heirs, in pursuance of the articles, in trust for himself in fee, till the marriage, and afterwards for the various purposes of the marriage articles, and for default of issue of the marriage, and subject to a term for securing the jointure, to the use of himself in fee: he afterwards married and died without issue; the Court of C. P. held that the deed of settlement, whereby he departed with the whole estate devised, operated as a revocation of the will, though he took back a fee by the same instrument, and though it was consistent with the provisions of the will: and it was held (*dissent. Eyre*, C. J.) that it made no difference, that with respect to one of the estates the conveyance in fee to the trustees was merely for the purpose of creating a term to secure his wife's jointure; and that the settlor took back the fee again subject to that term. *Goodtitle d. Holford* v. *Otway*, 2 H. B. 516. (Trial at bar).—1 B. & P. 576; judgment of C. P. on the special verdict.—Affirmed in K. B.
7 T. R. 399

16. *A.* having no issue, and being tenant in tail under the will of Dr. *G.*, with remainder to *B.* and *C.* for life, remainder to the heirs of their bodies, for such estates and in such proportions as they or the survivor should appoint, and in default of such appointment, remainder to the heirs of the body of *B.*, with remainders over; made his will, whereby, after devising certain estates to trustees to sell and apply the purchase money amongst different relations, and directing them to sell all other his real estates, and apply the money to some of those relations; he gave 5*l.* a-piece to *C.* (who survived *B.*) and to *D.* the only child of *B.* and *C.*, "in consideration of "the ample provision made for them "after my decease by Dr. *G.*, who "has by his will devised to them "certain estates in *R.*, now in my "possession, which, though I could "now legally dispose of, I mean "fully to *confirm* to them: according to the intent of the said will." After this *A.* suffered a recovery, and declared the uses to himself for life, remainder to such persons and for such uses as he by deed, will, or codicil to be properly attested, should

appoint; and for default of such appointment, to *C.* for life, remainder to *D.* for life, with remainder over in fee. After this he made a codicil, duly executed, whereby he *confirmed* his said will in all respects not thereby altered; and after making some alterations in respect of other property, he declared such codicil to be part of his said will.

Held that *C.* and *D.* took nothing under the will and codicil of *A.* in the property which had belonged to Dr. *G.*: for it did not appear that *A.* intended by his will to devise the property in question, but rather to let it pass as it was devised by the will of Dr. *G.*: and his confirmation of his will by his codicil could not carry it further.

But even if he had intended to exercise a devising power by the will, according to the estates carved out by D. *G.*'s will for *C.* and *D.*, yet he afterwards altered that intent, and took a new estate in the premises, by suffering a recovery, the uses of which were different from those of Dr. *G.*'s will, reserving to himself a power of appointment by deed, will or codicil: and when he executed a codicil afterwards, confirming his will in all respects, except where altered or revoked by his codicil, and then made specific alterations as to other parts of his property, without reference to his power, or to the property in question (though such reference be not essentially necessary to the execution of a power, if it plainly appear that the party means to execute it) nothing appeared to shew that he meant to execute the power by his codicil confirming his will generally, supposing it could take effect through the medium of such a will.

Lane v *Wilkins, M. 49 G.* 3. 10 E. R. 241

17. A testator having devised his lands, suffered a recovery thereof, in which, as well as in the deed to make a tenant to the precipe, the tenant was called *Edward*, his real name being *Edmund:* in ejectment by the heir at law against the devisees, the Court of C. P. held that the recovery was good by Estoppel against the testator and all persons claiming under him, and that the will therefore was revoked thereby. *Doe d. Lushington* v. *Landaff (Bp.)* 2 N. R. 491

18. One devised his personal estate to *A.* and his real estate to *B.*, and after *A.*'s death, the devisor having acquired other real property, some by devise and some by purchase, he made a second will, disposing by name of his after-acquired testamentary estate to *C.*, and then added, "*As to the rest of my real and personal estate, I intend to dispose of it by a codicil, hereafter to be made by this my will.*" This is no revocation of the first will, whether considering that he meant to include the same property therein devised: because it is a mere declaration of an intent to dispose of it in future; and *non constat* that such disposition would be inconsistent with the first will; or considering that he meant only to include his after-purchased property not before devised, and his personal estate, the bequest of which had lapsed by the death of *A.* *Thomas d. Jones & al.* v. *Evans.* 2 E. R. 488

19. If a testator having executed a devise of lands in the presence of three witnesses, to two persons as joint tenants in fee, afterwards strike out the name of one of the devisees and there be no republication, the erasure will only operate as a revocation of the will *pro tanto.* *Larkins* v. *Larkins.* 3 B. & P. 16. 109

20. Where one devised lands to two trustees, and he afterwards struck out the name of *one* of those trustees, and inserted the names of two others; leaving the general purposes of the trust unaltered, though varying in certain particulars: and did not republish his will: held that his intent appearing to be only to revoke by the substitution of another good devise to other trustees; as such new devise could not take effect for want of the proper requisites of the statute of frauds, it should not operate as a revocation; or at most it could only operate as a revocation *pro tanto,* as to the trustee whose name was obliterated; leaving the devise good as to the old trustee whose name was retained. *Short d. Gastrell* v. *Smith & al.* 4 E. R. 419

21. Under a devise to *A.* for life; remainder to trustees to preserve contingent remainders; remainder to the first and other sons of *A.* successively in tail male; with like remainders to *B.* and his sons; with remainder to *the right heirs male of* A. *for ever;*

these last words are words of limitation, and not of purchase, notwithstanding the prior estates given to the sons of *A.* and their issue male, which are not of themselves sufficient to indicate an intention in the testator to use those words differently from their legal signification; particularly as such words might, in certain events, operate to advance the general intent of the testator, and let into the succession some male descendants of *A.*, who might be excluded from taking under the prior limitations to his first and other sons in tail male. And such ultimate limitation to the heirs male of *A.*, to whom a precedent estate for life was given, operating to give him an estate in tail male in remainder, such devise lapses by his death before the testator. *Doe d. Albemarle (E.)* v. *Colycar.* 11 E. R. 548

22. A devise of all the rest and residue of the testator's estate in the manor and lands of *B.*, &c. not already settled on his eldest son *S.*'s marriage, (except those parts of it before devised to his second son *H.*), together with all remainders and reversions of the said lands settled on the said marriage, to his eldest son *S.*, and the heirs of his body; and for default of issue of *S.*, then his said *entire* estate of *B.* to his son *H.* in tail, with remainders over; lapses by the death of *S.* in the lifetime of the testator, and the residue passes to *H.* immediately on the death of the testator, though *S.* left issue. *White* v. *Warner d. White* 11 E. R. 551, *n.*

DILAPIDATIONS.

1. An action on the case for dilapidations of a prebendal house may be maintained by a succeeding prebendary against his predecessor.
Radcliffe v. *D'Oyly.* 2 T. R. 630

2. The statutes of the church of *Ely* provide that the receiver shall require the prebendaries to repair their houses when necessary, and upon their default to repair them at their costs, but the materials are to be supplied out of the funds belonging to the church, and the charges of the workmanship only are to be borne by the prebendaries; on a question whether a succeeding prebendary should recover against his predecessor the full estimate of repairs wanting; or the amount of the workmanship only; the court thought it reasonable that he should recover the amount of the workmanship only; and held that the church were still bound to supply the materials. 2 T. R. 630

3. Where successive rectors had been in possession of land for above fifty years past; but in an action for dilapidations brought by the present against the late rector, it appeared that the absolute seisin in fee of the same land was in certain devisees, since the stat. 9 *G.* 2. *c.* 36. and that no conveyance was enrolled according to the first section of that act, nor any disposition of it made to any college, &c. according to the 4th section; held that no presumption could be made of any such conveyance enrolled, (which if it existed the party might have shewn,) and consequently that the rector had no title to the land; as the statute avoids all other grants, &c. in trust for any charitable use made otherwise than is thereby directed; although in fact it appeared that one of those devisees was the then rector, and that the title to the rectory was in *Baliol* College, *Oxford.*
Wright v. *Smythies.* 10 E. R. 409

DISCONTINUANCE of ESTATE.

In order to discontinue an estate tail, it is necessary that the party discontinuing should be actually seised by force of the entail. *Driver d. Burton* v. *Hussey & al.* 1 H. B. 269

DISTRESS.

1. Implements of trade may be distrained for rent if they be not in actual use at the time, and if there be no other sufficient distress on the premises.
Gorton v. *Falkner.* 4 T. R. 565

2. So may beasts of the plough under the same circumstances. 4 T. R. 565

3. But things affixed to the freehold, such as an anvil or mill-stone, cannot be distrained. 4 T. R. 565

4. A horse cannot be distrained damage feasant, if there be a rider upon him.
Storey v. *Robinson.* 6 T. R. 138

5. Things delivered to persons exercising their trade, such as cloth in a tailor's shop, are not distrainable.
Simpson v. *Harcourt.* 4 T. R. 569

6. A landlord may distrain for the rent of ready furnished lodgings.
Gwinn v. *Anderton.* 2 N. R. 224

7. The five days allowed before a distress can be sold, are inclusive of the day of sale.

Wallace v. *King & al.* 1 H. B. 13

8. A terre-tenant holding under two tenants in common, cannot pay the whole rent to one after notice from the other not to pay it; and if he do, the other tenant in common may distrain for his share.

Harrison v. *Barnby.* 5 T. R. 246

9. Where the lessee of lands dies before the expiration of the term, and his administrator continues in possession during the remainder, and after the expiration of it, a distress may be taken for rent due for the whole term; under statutes 32 *H.* 8. *c.* 37. & 8. *An.* c. 14. *Braithwaite* v. *Cooksey & al.* 1 H. B. 465

10. A tenant holding over after the expiration of his term cannot distrain the landlord's cattle which were put upon the premises by way of taking possession. *Taunton* v. *Costor.* 7 T. R. 431

11. A custom that a tenant may leave his away-going crop in the barns, &c. of the farm: for a certain time after the lease is expired, and he has quitted the premises, is good: and the landlord may distrain the corn so left, for rent arrear, after six months have expired from the determination of the term, notwithstanding the stat. 8 *Ann.* *c.* 14. § 6. 7.

Bearen v. *Delahay & al.* 1 H. B. 5

And see *Lewis* v. *Harris*, S. P. 1 H. B. 7, *n.*

12. One warrant of distress for the amount of several duties imposed by different acts of parliament, each giving a power of distress, is legal.

Patchett v. *Bancroft.* 7 T. R. 367

13. The judgment of the commissioners of land-tax on appeal is conclusive in an action of trespass brought against the officer for levying under a warrant of distress. 7 T. R. 367

14. Commissioners, under an act of parliament, directing them yearly and every year, to rate, charge, tax, and assess certain lands for a certain number of years, having omitted to make any rate or assessment for several years, at length made an assessment for one year, and added it to the arrears of the past years, and levied for the assessment so made, including such arrears; held that no arrears could be due for the years respecting which no assessment had been made, and that the distress was therefore bad.

Newton v. *Young.* N. R. 187

DIVISION.

1. The moiety of a penalty being given by stat. 22 *G.* 3. *c.* 41, to the treasurer of a county, riding, or *division*; held that the word *division* does not apply to small districts, such as the Cinque Port of *Seaford* in *Sussex*; but must be construed with reference to *county* and *riding*, and means something analogous to them.

Evans q. t. v. *Stevens.* 4 T. R. 224

2. Neither can it be applied to the different parts of a county in which the magistrates act under one general commission, but for the convenience of the county adjourn the Quarter Sessions from one part of it to another, and appoint a separate treasurer for each. *Evans q. t.* v. *Stevens.* 4 T. R. 459

3. It is only applicable to the legal divisions in *Lincolnshire*, where there are separate commissions of the peace, and separate sessions in the different divisions of the county. 4 T. R. 462

DOCKS.

1. The stat. 39, 40 *G.* 3. *c.* 69. § 184. directs that the West India Dock Company shall sue in the name of their treasurer, in all actions by or on behalf of the Company, and that he shall be sued for the recovery of any claim or demand upon, or of any damages occasioned by the Company; and § 185, after extending the protection of the stat. 24 *G.* 2. *c.* 44. for privileging Justices of the Peace in actions brought against them as such, to the Lord Mayor and Aldermen of London acting under this act, beyond the limits of the city; directs that "no action shall be commenced against *any person or persons for any thing* done *in pursuance or under colour of this act*, until after 14 days' notice in writing, or after tender of amends," &c. The Court of K. B. held that the treasurer is a person within the protection of the said clause: and being sued for an act done by the Company which induced an injury to the plaintiffs, was entitled to such notice before the action brought. The notice is necessary in actions for trespasses or torts, but *Qu.* whether in assumpsit.

Wallace v. *Smith, Tr. of W. I. Dock Co.* 5 E. R. 115

2. The stat. 39-40 *Geo.* 3. *c.* 69. § 137. gives to the *West India* Dock Company certain rates and duties for all goods imported from the *West Indies* which shall be landed, &c. from on board any ship entering into and using the docks; which rates are directed to be "accepted for the use of the docks, and the quays, wharfs, and cranes, and other machines belonging thereto, and the land-waiters' fees on account of such goods after being unshipped, and all charges and expenses of wharfage, landing, housing, and weighing such goods, and of such cooperage as the same may want after being unshipped, and all rent for warehouse room for twelve weeks, and *all charges of delivering the same from the said warehouses.*" The latter words include a delivery of the goods into lighters in the docks, as well as an immediate delivery from the warehouses into land carriages placed under the cranes of the warehouses; although for the purpose of such delivery into lighters it be necessary to put the goods upon trucks, in order to carry them across the quay, and afterwards to crane them into the lighters. But it seems that if the owner require any work to be done upon the goods, ultra the mere transitus of them from the warehouse to the lighter, the Company are entitled to an extra compensation, to be settled by convention between the parties, as in other cases out of the act.

Harden v. *Smith.* 8 E. R. 16

3. The compensation clause, § 121. of the stat. 39-40 *G.* 3. *c.* 69. directing that in case any warehouses, &c. (used for holding *West India* produce before that act) should be rendered *less valuable* by reason of the *West India* trade being diverted therefrom by the then intended *West India* docks and works, than they were *before the passing of the act*; or in case the *yearly* or *other receipts of Christ's* hospital should be thereby lessened; the owners of such warehouses, &c. and the governors of the hospital should be compensated (thereby putting such owners, and governors on the same footing), must be construed with reference to the *yearly* profits made of the premises *antecedent* to the passing of the act; and the *value* of such warehouses cannot be evidenced by the yearly profits made between the passing of the act; and the opening of the docks, by which latter the loss was occasioned.

Manning v. *Commissioners of Compensation under the West India Dock act.* 9 E. R. 165

4. Under the Bristol Dock act 43 *G.* 3. *c.* 140. which gives compensation where by means of the Dock works, damage may be done to any hereditaments, or they may be rendered less valuable thereby, no compensation is due to the owners of a brewery for a loss arising to them in their business from the deterioration of the water of a public river, from which the brewery had before been supplied; the use of the water having been common to all, and not claimed as an easement to a particular tenement; the only remedy for such injury is by indictment, which was taken away by the act.

R. v. *Bristol Dock Co.* 12 E. R. 429

5. Under the Liverpool dock acts, 8 *Ann c.* 12: 2. *G.* 3. *c.* 86. tonnage duties are payable on all vessels sailing with cargoes outwards or inwards, according to several descriptions of voyages, one being to and from America generally, so as no ship shall be liable to pay more than once for the same voyage, *out and home:* a voyage out from Liverpool to Halifax in North America, where the ship delivered a cargo and took in another for Demerara in South America, and from thence returned with a new cargo to Liverpool; was held to be all the same voyage out and home, and chargeable only with one rate. *Gildart* v. *Gladstone.* 11 E. R. 675. 2 W. P. T. 97: 12 E. R. 439

6. The devisee, and not the executor, of the owner of premises deteriorated by docks, is entitled to compensation for damages to the inheritance of premises in lease. *R.* v. *London Dock Commissioners.* 12 E. R. 477

7. The owner of a homeward bound ship entering the West India docks in so leaky a state as to require unloading and assistance without waiting her regular turn, is liable to pay all extra expenses.

Blackett & al. v. *Smith.* 12 E. R 518

8. Where the private property of Docks is by consent of the owners invested with a public interest or privilege for the benefit of the public, the owners must hold it subject to the rights of the public.

Allnutt & al. v. *Inglis.* 12 E. R. 527

DOMICILE.

1. Personal property follows the person of the owner, and in case of his decease must be distributed according to the law of the country in which he was domiciled at the time of his death, without regard to the actual *situs* of the property. *Bruce* v. *Bruce, Dom. Proc. April* 1790. 2 B. & P. 229, *n.*
2. A person born in *Scotland* having gone out to *India* in the service of the *East India* Company, and having died there, it was held that *India* was the place of his domicile. *ib.*
3. For the place where a man is, shall *primâ facie* be taken to be the place of his domicile. *ib.*
4. But if such person had gone to *India* in the king's service, or for any temporary purpose, it seems that the domicile of his birth would not have been altered. *ib.*
5. Mere intention to return to his native country at some future period, is not sufficient to prevent the change of domicile if the person die before such intention be put in execution. *ib.*

(And see BARON and FEMME II. 13.)

DONATIVE.

1. *Qu.*—How far the nature of a donative is changed by having been augmented by Queen *Anne*'s bounty?
   R. v. *Bishop of Chester.* 1 T. R. 397
2. In the case of a donative, the party is in full possession immediately on the nomination, and may maintain an action for money had and received against any person who receives the rents and profits. 1 T. R. 403

DOWER.

1. Dower is due of mines wrought during the coverture, whether by the husband, or by lessees for years; whether paying pecuniary rents, or rents in kind; and whether the mines are under the husband's own land, or have been absolutely granted to him to take the whole stratum in the land of others.
   Stoughton v. *Leigh.* 1 W. P. T 402
2. If land assigned for dower contain an open mine, tenant in dower may work it for her own benefit. *ib.*
3. Dower may be assigned of mines, either collectively with other lands, or separately of themselves. It shall be assigned by metes and bounds, if practicable; otherwise, either by a proportion of the profits, or separate alternate enjoyment of the whole for short proportionate periods.
   1 W. P. T. 142
4. If the heir being of *full age* assign excessive dower, he has no remedy at law; but if the sheriff assign excessive dower the heir may have a *scire facias* to obtain an assignment *de novo;* or if the heir *under age* assign excessive dower, he may have relief by writ of admeasurement of dower. *ib.*
5. *A.* seised in fee, devised to *B.* his son for life, remainder to the heirs of his body in tail, remainder to his own three daughters and their heirs; on the death of *A.*, *B.* entered and became seised of all *A.*'s lands, and by deed between himself and his mother, assigned to her the possession of a third part of all the premises, to hold to her and her assigns for her life, as if she had been in possession of the same by virtue of a writ of dower, and appointed *C.* and *D.* attornies, to enter and give livery and seisin of one full third part; and the indorsement of the deed stated, that *C.* and *D.* delivered seisin of all the premises to the mother, to hold according to the uses and intentions of the deed. *B.*'s mother having become seised of an undivided third part of all the lands, and during her life, *B* levied a fine *sur cenusance de droit come ceo,* with proclamations, of the whole of the premises, and suffered a recovery, and died leaving no issue, but having devised away all the lands of *A.* to a stranger: the Court of C. P. held, that the deed between *B.* and his mother, and the livery made thereon, was a good assignment of dower to her; and therefore the fine and recovery suffered by *B.*, and non-claim within five years after the death of *B.*, did not bar the remainder in fee to the daughters of *A.* in that one-third part which *B.*'s mother had in dowry at the time of such fine and recovery. *Rowe* v. *Power, &c., in error.* 2 N. R. 1

DYER'S REPORTS.

The marginal notes in *Dyer*'s Reports are good authorities, being written by Ld. Ch. Justice *Treby*. *Milward* v. *Thatcher, per Buller,* J. 2 T. R. 84

E.

EAST INDIA COMPANY.

1. The sales of the *East India* Company being subject to a regulation that any buyer not making good the remainder of his purchase money on or before the day limited for such payment should forfeit the deposit, "and should be rendered incapable of buying again at any future sale, until he should have given *satisfaction* to the Court of Directors:" held that the term satisfaction must be considered to mean pecuniary compensation for the non-performance of his agreement to pay on the appointed day, and that a buyer having made default on the day, but afterwards, within a future time given to him by the Company, paid the remainder of the purchase money with interest, might maintain an action against the Company for refusing to allow him to become a bidder at their sales, such sales, being by 9 & 10 *W.* 3. *c.* 44. § 69. declared to be public and open sales. *Eagleton* v. *East India Company.* 3 B. & P. 55
2. *Quere*, Whether since the passing of 18 *G.* 3. *c.* 26. which regulates the deposits, forfeitures, and incapacities of bidders at the tea sales of the *East India* Company, the Company can make or enforce any other regulations affecting those sales than such as the act of parliament has enacted? *ib.*

EJECTMENT.

I. *Title of the lessor.*

1. In ejectment the legal title must prevail. See *Doe d. Hodsden* v. *Staple* 2. T. R. 684: *Goodtitle d. Jones* v. *Jones*, 7 T. R. 47: see also 8 T. R. 2.; 129: *Roe d. Eberall & al.* v. *Lowe & al.* 1 H. B. 447; and 5 E. R. 38, 39
2. Nor is there any difference in this respect between the case of an ejectment brought by a trustee against his *cestui que trust* and an ejectment brought by any other person.
Roe d. Reade v. *Reade.* 8 T. R. 122
3. A possession of crown land, commencing at least 55 years since by encroachment on the crown in the time of the lessor of the plaintiff's father, maintained by the father till his death, 19 years since, and afterwards continued for two years by his widow, when the defendant obtained the possession, would be sufficient evidence for the jury to presume a grant from the crown to the lessor's father, if the crown were capable of making such a grant: in order to support a demise in ejectment from the eldest son and heir of such first possessor, against the defendant, who had no apparent title, and whose possession was not defended by the crown nor found to be by licence from it.

But it appearing, upon a second trial, that by the stat. 20 *Car.* 2. *c.* 3. all future grants of land by the crown in the forest of *Dean*, within which the land in question lay, were avoided, and consequently no presumption could be made of a valid grant; the lessor of the plaintiff, who can only recover in ejectment by the strength of his own title, was held not entitled to recover even against a stranger, whose possession, adverse to him, was not defended by the crown: And this, notwithstanding a part of the premises was first held by the lessor's father 60 years since; and by the stat. 9 *G.* 3. *c.* 16. the suit of the crown is barred after a continuing adverse possession for 60 years under the original trespasser: For from the death of the father, 19 years since, the possession was adverse to his heir, the lessor of the plaintiff; or at least the defendant's possession for the last 17 years was adverse; and the act of *Geo.* 3. does not give *a title* to the first wrongful possessor and those claiming under him, but only bars the remedy of the crown against them after 60 years continued adverse possession by them; and as it does not repeal the stat. 20 *Car.* 2. *c.* 3. no presumption of a grant to legalize the possession of the lessor's father for the first 41 years, on which alone the lessor's claim could be founded, can be made against that statute. And the jury, it seems, may presume that the possession of the lessor's father for the first 41 years, and that of the defendant (adverse to the heir) for the last 17, were both legally holden by the licence of the crown.
Goodtitle, d. Parker,
v. *Baldwin.* 11 E. R. 488
4. The trustee of a term not having notice of an agreement for a lease before the grant of the term, may maintain an ejectment against the tenant in possession under the agreement. *Goodtitle d. Estwick* v. *Way.* 1 T. R. 735
5. One having devised a leasehold estate after the decease of *J. K.* &c. to *T. C.* for life, remainder to any child he might have, and his executors, &c. for ever, upon condition that in case

the said *T. C.* shall die an infant unmarried and without issue, the premises to go over to *W. G.* &c. The Court of K. B. held that though the devise of a term for life, with a contingent remainder over, will in general only entitle the first taker to a life estate, if the remainder over do not take effect, and the residue of the term will go to the personal representative of the testator; yet the testator's intent appearing to be to dispose of the whole from his executors, the lessors of the plaintiff, who claimed under his will, were entitled to recover after the death of *T. C.* without issue. *Doe d. Everett & al.* v. *Cooke & al.* 7 E. R. 269

6. *A.* devises copyhold lands to *trustees in fee* (who are to be renewed from time to time) in trust that the rents and profits shall for ever afterwards be disposed of to certain *charitable purposes;* and directs that the rent of the said copyhold lands "*should never be improved or raised, but continue at* 11*l. per annum,* and that *B.*, who was *tenant* of the said copyhold lands *and his children and posterity which shall succeed, should never be put forth or from the same, but always continue the possession paying the rent of* 11*l.*" neither *B.* nor his descendants were ever admitted on the Court Rolls. If *B.* took any *estate* it was an *equitable estate tail.* *Roe d. Eberall & al.* v. *Lowe & al.* 1 H. B. 447

7. But the interest of *B.* (whatever it was) will not prevent the trustees from recovering in ejectment, though the rent has been regularly paid. 1 H. B. 447

8. An equitable estate tail of a copyhold cannot be barred by the devise *alone* of the tenant in tail. 1 H. B. 447

9. *Quere*, whether such estate tail would be barred by a lease made by the tenant in tail for a long term, *ex. gr.* for 2000 years? 1 H. B. 447

10. But clearly where such lease is attended with doubtful or suspicious circumstances it shall not prevent the trustees from recovering in ejectment against the lessee. 1 H. B. 447

11. Nor is it an objection to the title of the trustees, that from the time of the original devise of *A.* to a *certain period*, the former trustees do not appear to have been admitted on the rolls of the manor, if there have been regular surrenders and admittances for a considerable time (*ex. gr.* for above 40 years) *since that period:* for it will be presumed that surrenders and admittances were regularly made *before that period;* especially as the rent has been regularly paid. 1 H. B. 447

12. The trustees under a turnpike act having demised to one of several mortgagees, such proportion of the tolls arising from the road and of the toll-houses and toll gates for collecting the same, as the sum advanced by him bore to the whole sum raised on the credit of the tolls, the mortgagee brought ejectment for the toll-houses and toll gates in order to repay himself the interest due: held that he might well maintain his action, notwithstanding a clause in the act that all the mortgagees should be creditors upon the tolls in equal degree.
Doe d. Banks v. *Booth.* 2 B. & P. 219

13. The jury may presume an old satisfied term surrendered to the *cestui que use*, in order to substantiate a lease executed by him, or a conveyance by trustees where they ought to have conveyed. *Doe d. Bowerman* v. *Sytourn.* (But see *post* 29.) 7 T. R. 2

14. But if no such presumption be made, and it appear in a special verdict in ejectment that such a term is still outstanding in a trustee who is not joined in bringing the ejectment, the *cestui que use* cannot recover.
Goodtitle d. Jones v. *Jones.* 7 T. R. 47

15. Where the possession and receipt of rents, issues, and profits of a trust estate, though for above 20 years after the creation of the trust, without any interference of the trustees, is consistent with and secured to the *cestui que trust* by the terms of the trust deed, such possession is not adverse to their title, so as to bar their ejectment against his grantees brought after the 20 years. *Keene* v. *Deardon* 8 E. R. 248

16. The surrenderor before admittance is considered as a trustee for the surrenderee, and therefore is not permitted to set up a formal objection against the plaintiff's recovering that property which he holds for *his* benefit. 1 T. R. 600

17. One tenant in common cannot set up an outstanding unsatisfied term in bar to an ejectment for a moiety by another tenant in common.
Doe d. Pristowe v. *Pegge.* 1 T. R. 759, *n.*

18. In ejectment, brought upon the joint demise of several trustees of a charity, it is not enough for the defendant who had paid one entire rent to the common clerk of the trustees, to shew that the trustees were appointed at different

times as evidence that they were tenants in common: for as against their tenant his payment of the entire rent to the common agent of all, is at all events sufficient to support the joint demise, without making it necessary for them to shew their title more precisely. *Doe d. Clark & al.* v. *Grant.* 12 E. R. 221

19. If Copyhold descends by custom to all the children equally of the tenant last seized, one of the joint tenants may maintain ejectment on his single demise for his own share.
Roe d. Raper v. *Lonsdale.* 12 E. R. 39

20. Where a prescriptive ecclesiastical corporation of vicars choral of the cathedral of *Chichester* had, besides other estates in common, four vicarial houses with their appurtenances, which had always been appropriated to the several use and residence of the four vicars; and by ancient custom, upon every vacancy the vicars, according to seniority, made their option of taking *in severalty* any one of such vicarial houses with the appurtenances; of which option an entry was made in the corporation act book and signed by the vicars; held that a new vicar, having made an option, which was entered in the book and signed by all, to take one of the vicarial houses, *with certain appurtenances*, then in the possession of *J. S.*, which were *not all the appurtenances* formerly annexed to and enjoyed with the same house by his predecessors therein, could not maintain an ejectment for the other appurtenances, such as part of the ancient garden which had been leased off by the corporation before his appointment. For supposing him entitled to make an option of the *entire premises*, and to have it entered in the act book, as against the corporation; yet no such option having been made and entered in the act book, according to the custom, he had no separate legal title to the premises in question, on which he could maintain an ejectment. *Goodtitle, d. Miller, Clerk* v. *Wilson.* 11 E. R. 334

21. The plaintiff in ejectment under the several demises of two, may after notice to quit, recover the possession of premises held by the defendant as tenant from year to year, upon evidence that the common agent of the two had received rent from the tenant, which was stated in the receipts to be due to the two lessors; even assuming such receipts to be evidence of a joint tenancy; for a several demise severs a joint tenancy; and, supposing the contract with the tenant to have been entire, no objection lies on that account to the plaintiff's recovery in this case, as he had the whole title in him. *Doe d. Marsack & al.* v. *Read.* 12 E. R. 57

22. A declaration in ejectment contained two demises by two different lessors of two distinct undivided thirds; judgment was given that the plaintiff "do recover his said terms." On error it appeared, from the facts stated on a bill of exceptions to the Judge's directions on a point of law, that the ejectment respected only one undivided third: held, well enough on this record, where the point was only raised by bill of exceptions. *Rowe* v. *Power, &c. in error.* 2 N. R. 1
Semble, that it would be well enough even on special verdict. *ib.*

23. Where a trust term is a mere matter of form, and the deeds were muniments of another's estate, it shall not be set up against the real owner. 1 T. R. 759, *n.*

24. A trust shall never be set up in an ejectment against him for whom the trust was intended. 1 T. R. 759, *n.*

25. A tenant in possession under a lease, whose tenancy is not meant to be disturbed by the lessor of the plaintiff in ejectment, claiming the inheritance, shall never set up his lease to bar the recovery. (*Per* Ld. *Mansfield in Doe* v. *Pegge.*) 1 T. R. 759, *n.*

26. But it was held that a plaintiff who claims under an *elegit* subsequent to a lease granted to the tenant in possession, cannot recover, in ejectment, though he give the tenant notice that he does not mean to disturb his possession, only wishing to get into the receipt of the rents and profits of the estate. *Doe d. da Costa* v. *Wharton & al.* 8 T. R. 2

27. A mortgagor cannot set up the title of a third person against his mortgagee in an ejectment; nor can a tenant set up the title of a third person in an ejectment to bar his own lessor. 1 T. R. 759

28. A surrender of chambers in *New Inn* to the treasurer and ancients of the Society, made with their assent, to the intent that they may grant the said chambers to a purchaser passes the estate to such purchaser before admission; for admission in this case is not necessary as in the case of copyholds to complete the grantee's estate, but it is only for the purpose of signi-

fying the assent of the Society that the grantee should become a member of the Inn; and therefore upon the death of the surrenderee before admission, the Society may maintain ejectment for them. *Doe d. Warry & al.* v. *Miller & al.* 1 T. R. 393

29. Whether the surrenderee of a copyhold before admittance can recover against the lord or a stranger? *Q.* 1 T. R. 600

30. One admitted tenant, upon a claim as administrator de bonis non to the grantee of a copyhold pour autre vie, having no title in such character, cannot recover in ejectment by virtue of such admission, as upon a new and substantive grant of the lord. *Zouch d. Forse* v. *Forse.* 7 E. R. 186

31. The devisee of a copyhold or customary estate which had been surrendered to the use of the will, having died before admittance, her devisee, though afterwards admitted, cannot recover in ejectment, for he cannot be put into a better situation than his devisor was, and his admittance has no relation to the last legal surrender, but the legal title remains in the heir of the surrenderor. *Doe d. Vernon* v. *Vernon.* 7 E. R. 8

32. *A.* a copyholder for life, remainder to *B.*, surrenders his own and *B.*'s estate, (over which latter he had no control, and by which he let in *B.*'s remainder,) and takes a new copy for the lives of himself, *C.*, and *B.*, successively; and on *A.*'s death, after 20 years had run against *B.*, *B.* enters on the possession then vacant: held that as against *C.*, who had no possession and no title, *B.* might defend his legal title, coupled with possession, in ejectment; however 20 years adverse possession by *A.* might have barred *B.*'s possessory right as against him; or might have disabled *B.*, if he had continued out of possession, from recovering in ejectment. *Doe* v. *Reade.* 8 E. R. 353

33. One having good title to the possession of a copyhold, as tenant by the curtesy, by the custom of the manor; his possession of the copyhold after his wife's death will be referred to that, and not to any adverse title; though he were admitted after his wife's death to hold to him pursuant to a settlement, by which the estate of the wife was limited to the survivor in fee, so as to let in the title of the heir at law of the wife, in ejectment brought within 20 years after the husband's death, though more than 20 years after the death of the wife. *Doe d. Milner, Bart.* v. *Brightwen.* 10 E. R. 583

34. A second mortgagee, who takes an assignment of a term to attend the inheritance, and has all the title-deeds, may recover in ejectment against the first mortgagee, not having had notice of such prior mortgage. *Goodtitle d. Norris* v. *Morgan.* 1 T. R. 755

35. The title of a purchaser for a valuable consideration cannot be defeated by a prior voluntary settlement of which he had no notice; though he purchased of one who had obtained a conveyance by fraud, but of which fraud he the purchaser was ignorant. *Doe d. Bothell* v. *Martyr.* N. R. 332

36. A lease of a rectory by a rector becomes void by stat. 13 *Eliz. c.* 20. by his non-residence for 80 days, of which a stranger may take advantage. *Doe* v. *Barber.* 2 T. R. 749

37 There is no distinction between a demise by deed or by parol. 2 T. R. 749

38. And his lessee cannot maintain an ejectment against a stranger, who enters without any title whatever. 2 T. R. 749

39. So the rector himself may recover in ejectment against his lessee under such circumstances. *Throgmorton d. Fleming* v. *Scott.* 2 E. R. 467

(See 2 E. R. 467. EVIDENCE IV.

40. Where tenant for life levies a fine, though it is no bar to those in remainder, yet it seems that a remainder-man must make an actual entry before he can maintain an ejectment. *Doe d. Compere* v. *Hicks.* 7 T. R. 433

41. Where ejectment is brought after a fine levied by the defendant, but before all the proclamations have been made under the stat. 4 *Hen.* 7. *c.* 24., it is not necessary for the lessor to prove an actual entry to avoid such fine; considering it to operate only as a fine at common law: but by the defendant's confession of lease, entry, and ouster, the merits only of the lessor's title are put in issue. *Doe* v. *Watts.* 9 E. R. 17

42. A forfeiture by tenant for years in levying a fine, not having been taken advantage of by the entry of the then reversioner to avoid the lease, cannot be taken advantage of after the reversion has been conveyed away, to recover the

estate, in ejectment, from the tenant upon the several demises of the grantor and grantee of such reversion. *Fenn d. Matthews & al.* v. *Smart.* 12 E.R.444

43. Though a satisfied term may be presumed to be surrendered (see *ante* 11) yet an unsatisfied term, raised for the purpose of securing an annuity, during the life of the annuitant cannot and may be set up as a bar to the heir at law in ejectment, even though he claim only subject to the charge. *Doe d. Hodsden* v. *Staple.* 2 T. R. 684

44. The court will not stay the proceedings in an ejectment brought by a mortgagee against a mortgagor on the latter paying principal, interest and costs, if he has agreed to convey the equity of redemption to the mortgagee. *Goodtitle d. Taysum* v. *Pope.* 7 T.R.185

45. If *B.*, claiming under *A.* let lands for a year to *C.*, and die, and *A.* afterwards bring an ejectment against *C.*, *C.* cannot dispute the title of *A.* *Barwick d. Richmond (Corp.)* v. *Thompson.* 7 T. R. 488

46. In ejectment by a landlord against a tenant, whose lease is expired, the latter is not barred from shewing that his landlord's title is expired. *England d. Syburn* v. *Slade.* 4 T. R. 682

47. The court will not permit a *cestui que trust*, not having been in possession, to be made defendant in ejectment instead of the tenant, as landlord, under stat. 11 *G.* 2. *c.* 19. § 13.: but they will permit the *heir at law*, or *remainder-man* claiming under the same title. *Lovelock d. Norris* v. *Dancaster T.* 30 *G.* 3. 3 T. R. 783 & *n.* Or a *devisee* in trust. 4 T. R. 122

48. The Court of K. B. permitted a mortgagee to be made defendant in ejectment *with* the mortgagor. *Doe d. Tilyard* v. *Cooper.* 8 T. R. 645

49. The lessor of the plaintiff suing in *formâ pauperis* will be dispaupered in case of vexatious delay. *Doe d. Leppingwell* v. *Trussell.* 6 E. R. 505

II. *Demise; Time of.*

1. Where an entry is necessary the demise must be laid after it. 7 T. R. 433

2. A natural entry is necessary to avoid a fine, and the party so avoiding it cannot lay his demise in an ejectment, or recover the mesne profits that accrued, before such entry. *Lee Compere* v. *Hicks.* 7 T. R. 727

3. One tenant in common levying a fine of the whole, and taking the rents and profits afterwards without account for nearly five years is no evidence from whence the jury should be directed (against the justice of the case) to find an ouster of his companion at the time of the fine levied; and consequently the latter may maintain ejectment without making an actual entry. *Peaceable d.* v. *Hornblower* v. *Read & al.* 1 E. R. 568

4. The title to copyhold lands relates back from the time of the admittance to the surrender as against all persons but the lord; so that the surrenderee may recover in ejectment against the surrenderor on a demise laid between the times of surrender and admittance. *Holdfast d. Woollams* v. *Clapham.* 1 T. R. 600

5. A conveyance to a creditor of an insolvent debtor's estate by the clerk of the peace (in whom it is vested upon the order for the insolvent's discharge by the stat. 41 *G.* 3. *c.* 70. § 15. until the subsequent conveyance to the creditor), does not vest the estate in such creditor by relation, either to the date of the order or of the conveyance, but only from the actual execution of such conveyance by the clerk of the peace. Therefore such creditor cannot recover in ejectment upon a demise laid before the execution, though after the estate was out of the insolvent debtor, and the order was made to convey the same to the lessor. *Doe d. Whately* v. *Telling.* 2 E.R 257

6. In an ejectment brought by Mr. *Duncombe*, he could not prove the time when the term commenced, and the tenant proving it to be different from the time to quit mentioned in the notice, the plaintiff was nonsuited. *Cor.* Lord *Mansfield* at *G. H.* 1 T. R. 161

7. In ejectment, *Eyre*, Baron, held a notice to quit at *Lady-day* to be *prima facie* evidence of a holding from *Lady-day* to *Lady-day* till the contrary was shewn. *Doe d. Puddicombe* v. *Harris, Sum. ass.* 1784, at *Dorchester.* 1 T. R. 161

8. A parol agreement to lease lands for four years only creates a tenancy at will; and if that tenancy be not determined before the day of the demise laid in the declaration, the plaintiff cannot recover. *Goodtitle d. Galloway* v. *Herbert.* 4 T. R. 680

9. In the case of a tenancy *from year to year* as long as both parties please, if

the tenant die intestate, his administrator has the same interest in the land which his intestate had, and the lessee of such administrator may declare in an ejectment on a term for *seven years*; for the time is not conclusive.

Doe d. Shore v. *Porter*. 3 T. R. 13

10. An ejectment against the bailiffs *pro tempore* of a corporation cannot be maintained by proving payment of rent for the premises by the annual predecessors of the defendants in the same office for several years before, and service of the notice to quit on the defendants, the existing bailiffs: for the payment of such rent by the bailiffs in succession is merely evidence of a tenancy in the corporation. But at any rate such tenancy may be determined by a notice to the corporation to quit, served on its officers: after which, the owner of the premises may distrain the cattle of any persons trespassing on his ground, or bring his action against them, or maintain ejectment against any person in the actual possession of the premises.

Doe v. *Woodman*. 8 E. R. 228

11. Tenant in tail having received an ancient rent of 1*l*. 18*s*. 6*d*. from the lessee in possession under a void lease granted by tenant for life under a power, the rack-rent value of which was 30*l*. a year, cannot maintain an ejectment, (laying his demise, at least on a prior day,) without giving the lessee some notice to quit, so as to make him a trespasser, after such recognition of a lawful possession either in the relation of tenant, or at least a continuing by sufferance till notice.

Denn v. *Rawlins*. 10 E. R. 261

III. *Premises; Description of.*

1. Ejectment for a messuage *and* tenement is good after verdict. So for a messuage *or* tenement.

Doe d. Stewart v. *Denton*. 1 T. R. 11

2. *Sed vide contra. Doe d. Bradshaw* v. *Plowman*. 1 E. R. 441

3. After verdict in ejectment for a messuage *and tenement*, the Court will give leave to enter the verdict, according to the Judge's notes, for the messuage only, (pending a rule to arrest the judgment) without obliging the lessor of the plaintiff to release the damages. *Goodtitle* v. *Otway*. 8 E. R. 357

4. A demise of premises in *Westminster*, late in the occupation of *A*., particularly describing them, part of which was a yard, does not pass a cellar situate under that yard which was then in the occupation of *B*., another tenant of the lessor; and the lessor in an ejectment brought to recover the cellar is not estopped by his deed from going into evidence to shew that the cellar was not intended to be demised.

Doe d. Freeland v. *Burt*. 1 T. R. 701

5. Whether parcel or not of the thing demised is always matter of evidence. *ibid.*

6. If upon notice to quit given to a tenant, he gives notice to his undertenants to quit at the same time, and upon the expiration of the notice he quits so much as is occupied by himself, but his undertenants refuse to quit, an ejectment may still be maintained against him for so much as his undertenants have not given up.

Roe v. *Wiggs*. 2 N. R. 339

ELY.—ISLE OF.

1. The bishop of Ely has not a palatinate jurisdiction within the isle, though exercising *jura regalia* there.

Grant v. *Bugge & al*. 3 E. R. 128

2. A writ of *fieri facias*, directed in the first instance to the bailiff of the Isle of *Ely* out of K. B. is erroneous and void, and the bailiff executing the same is guilty of a trespass against the party whose goods are taken in execution. *ib.*

3. Process issued out of the courts at *Westminster* into the isle, goes in the first instance to the sheriff of *Cambridgeshire*, who thereupon issues his mandate to the bailiff of the franchise. *ib.*

ERROR.

I. *When it may be brought; and what may be assigned for Error.*

1. Defendants having agreed under a consolidation rule not to bring any writ of error, cannot do so, though there be manifest error on the record. But the Court will not grant an attachment against the attorney for having brought such writ of error, if it appear that it was not done *for delay*; and that he was led into a mistake.

Camden & al. v. *Edie*. 1 H. B. 21

2. In an action on stats. 1. *Jac*. 1. *c*. 15. § 11. and 12.: 5 *G*. 2. *c*. 30. § 29. by assignees of a bankrupt against one convicted of false swearing to a debt under the commission, to recover double the sum so sworn to, it is sufficient to state the conviction of the defendant

on the indictment, and no advantage can be taken of any defect in that judgment but by writ of error. *Holmes & al. (Assignees)* v. *Walsh*. 7T.R.458

3. So the court will not quash a return to a *mandamus* (which directed an inferior court to give judgment on an indictment) merely because it states an erroneous judgment given below: but a writ of error must be brought to reverse that judgment. *R.* v. *the Just. of the W. R. of Yorksh.* 7 T. R. 467

4. In trespass against two who suffer judgment by default, if plaintiff execute writs of inquiry against them separately, and take several damages against them, and enter up final judgment for those several damages, it is error. *Mitchell* v. *Milbank & al.* 6 T. R. 199

5. It is not a cause of error to enter a judgment of *misericordia* in a *qui tam* action for a penalty.
Humble v. *Bland, in (err.)* 6T.R.255

6. Nor that the plaintiff is adjudged to be in *misericordia* instead of the defendant. *Pullen* v. *Stokes: (in Cam. Scac.)* 2 H. B. 312

7. In an action on a penal statute, the declaration must allege the fact to be done *contra formam statui* or *statuorum*, as the case may be: stating that by force of the *statute* an action accrued, &c. is not sufficient, where the penalty is given by *one* statute, and the right of action to the informer is given by *another*.
Lee v. *Clarke*. 2 E. R. 333

8. *Semble*, where the record was entitled generally of *Hil.* 41 *G.* 3. and the fact was laid under a *viz.* on 21st of *January* 1801, whereas the return of the capias must have been at latest on the 20th of *January*, and so the suit appeared to be commenced, before the cause of action, contrary to the averment in the declaration; such repugnancy is no ground of error. *ib.*

9. *Semble*, if a statute give an action within six months after the fact committed, (by which must be understood *lunar* months) and the declaration aver such fact within six *calendar* months before, it is no error; as it will be presumed that the fact was proved within due time, notwithstanding such irrelevant allegation. *ibid.*

10. Though it appears on the return to a *certiorari*, that no bill was filed in the Court of King's Bench against the defendant, (in an action there by bill), *in* the term of which the declaration is entitled, but that a bill was filed against him by the plaintiff in the *following vacation*, it is *not erroneous*, if it also appears that the bill was filed *of* the preceding term.
Parrott v. *Spraggon, (in Cam. Scac.)* 2 H. B. 608

11. Error lies not upon an interlocutory judgment.
Samuel v. *Judin (in error.)* 6 E.R.333

II. *Writ of; its Effect in staying Execution, &c.*

1. Though a writ of error be sued out before judgment signed, it cannot have any effect till the judgment is actually signed. *Jaques* v. *Nixon*. 1 T.R. 279

2. And if a copy of the allowance be served before judgment signed, it only operates as an allowance from the time of signing judgment. 1 T. R. 279

3. The service of the allowance is only to bring the party into contempt if he proceeds; for the allowance is of itself a supersedeas. 1 T. R. 279

4. If a writ of error be sued out before judgment is signed, which is frequently the case, and the plaintiff will not sign judgment till after the return of the writ, in order to avoid the effect of it, and then sues out execution, the court will set aside the execution. 1 T.R.279

5. Two things are requisite to make a writ of error a *supersedeas* of execution, *viz.* the allowance, (*i. e.* the delivery of the writ to the clerk of the errors) and putting in bail. If the writ of error be allowed before judgment, the time for putting in bail (four days) runs from the judgment; if after judgment, from the time of the allowance.
Gravall v. *Stimpson*. 1 B. & P. 478

6. A writ of error operates as a *supersedeas* from the time of the allowance though it be not served till after execution.
Meagher v. *Vandyck*. 2 B. & P. 370

7. So though it be not returned.
(See BAIL VI. 3.) 2 E. R. 439

8. The allowance of a writ of error may be served before the plaintiff is entitled to sign final judgment.
Payne v. *Whaley*. 2 B. & P. 137

9. But the allowance of the writ of error, previous to the judgment being signed, is an irregularity permitted for the convenience of the party; for the judgment in the action is the true foundation of the writ of error. 2 B. & P. 479

10. The Court of K. B. will not allow a plaintiff there to issue a test, *fi. fa.* tested in the last term on the return day of the original *fi. fa*, which was after the allowance and service of the writ of error and before the death of the plaintiff in error. *Kinnaird (Ld.) & al.* v. *Lyall.* 7 E. R. 296

11. And after the writ of error allowed, though afterwards abated by the death of the plaintiff in error, the defendant in error cannot take out execution out the leave of the Court. *ibid.*

12. A writ of error upon a judgment in debt on a recognizance of bail is a stay of execution; not being within the exception of the stat. 3, *Jac.* 1. *c.* 8. either as a judgment upon an obligation conditioned for payment of *money only*; (the recognizance being to pay money or do something else;) or as a judgment upon a *contract* which is there used in contradistinction to an *obligation*.

Dell v. *Wild.* 8 E. R. 240

13. Where a first writ of error abates, or is put an end to by the act of the plaintiff in error, a second writ of error brought in the same court is not a supersedeas of execution as the first is: and execution may then be sued out without leave of the Court. But in error of matter of fact *coram vobis*, which is not within the statutes requiring bail in error, the writ of error is or is not a supersedeas according to circumstances; and the Court must be moved for leave to sue out execution pending it.

Birch v. *Triste.* 8 E. R. 412

14. The court will not infer that a writ of error was sued out for delay, because it was sued out before final judgment signed. And though it should be made returnable before final judgment, it will still operate as a supersedeas upon the judgment, which, when signed in the same term, relates back to the first day of it; and therefore execution issued thereon, after such writ of error allowed and served, was set aside for irregularity.

Somerville v. *White.* 5 E. R. 145

15. A writ of error may be made returnable before the day on which the judgment is actually signed, if the writ of error and judgment are of the same term. *Hill* v. *Tebb.* N. R. 298

16. And the teste of a writ of error need not be on a seal day. *ib.*

17. The court will not set aside an execution sued out before, but executed after the allowance of a writ of error served on the sheriff and the party, if the plaintiff in error has not regularly put in bail. *Lane* v. *Bacchus.* 2 T.R. 44

18. *Secùs*, if bail be put in in time. *ib.*

19. The defendant in an action on the judgment cannot apply to the court to stay the proceedings pending a writ of error on that judgment, until he has put in bail. *Smith* v. *Shepherd.* 5 T.R. 9

20. And the bail must be perfected before he can make such application.

Bicknell v. *Longstaffe.* 6 T. R. 455

21. Though the stat. 16 & 17 *Car.* 2. *c.* 8. § 3. provides that no execution in ejectment shall be stayed unless the plaintiff in the writ of error shall be bound for the costs in case judgment be affirmed, &c.; yet by reasonable construction it is sufficient if he procure proper sureties to enter into the recognizance of bail: but these may be examined as to their sufficiency, which the plaintiff in error himself cannot be. The practice is to take the recognizance in double the improved rent, and the single costs of the ejectment.

Keene v. *Deardon.* 8 E. R. 298

22. The Court of K. B. staid the proceedings in an action on a judgment, pending a writ of error brought to reverse that judgment, notwithstanding the plaintiff swore that the writ of error was brought for delay, and that he offered to the defendant's attorney to wave the judgment if he would point out any error, which was refused.

Christie v. *Richardson.* 3 T. R. 78

23. But see *Entwistle* v. *Shepherd.* 2 T. R. 78

23. And the Court of K. B. refused to stay proceedings against the bail, pending a writ of error on the judgment against the principal, where the principal *had confessed* that the writ of error was brought purely for delay.

Pool v. *Charnock.* 3 T. R. 79

26. Where defendant's attorney in effect told the plaintiff that the writ of error was brought for delay, the court refused to stay proceedings pending it.

Law v. *Smith, M.* 30 *G.* 3. K. B. 4 T. R. 436, *n.*

And *Miller* v. *Cousins.* 2 B. & P. 329 The same on a similar declaration by one of the bail. *Evans* v. *Gilbert, T.* 31 *G.* 3. K. B. 4 T. R. 436, *n.*

26. But it is not enough that the defendant's attorney has declared the debt would be settled, and that time was all the defendant wanted.
Rawlins v. *Perry*. N. R. 307

27. So on such declaration by the attorney, the Court of C. P. refused to set aside an execution issued after notice of the allowance of a writ of error.
Mitchell v. *Wheeler*. 2 H. B. 30

28. The courts have refused to set aside a defendant's execution for the costs of a nonsuit sued out after allowance of a writ of error, on the ground that the writ of error could only be for delay. *Box* v. *Bennett*. 1 H. B. 432
Kempland v. *Macauley*. 4 T. R. 436

29. But in a subsequent case the Court of K. B. said they would not refuse a rule to stay proceedings pending a writ of error on a judgment of nonsuit, without some declaration of the party, *&c.* that the writ of error was brought for delay. *Levett* v. *Perry*. 5 T. R. 669

30. Where the defendant's attorney had used expressions equivalent to such a declaration, the court refused to stay the proceedings pending a writ of error.
Masterman v. *Grant*. 5 T. R. 714

31. The court will not permit execution to be taken out pending a writ of error in parliament, on the ground that the writ of error is brought for delay, merely because the defendant suffered the judgment to be affirmed in the Exchequer-chamber without any objection. *Harrison* v. *Grote*. 6 T. R. 400

32. If defendant bring a writ of error, and plaintiff bring another action on the judgment and recover, he cannot sue out execution on the second judgment till the writ of error be determined. *Benwell* v. *Black*. 3 T. R. 643

33. Where an action is brought on a judgment recovered in K. B. and after judgment the defendant brings a writ of error, and obtains a rule to stay proceedings in the mean time, and the plaintiff dies before judgment affirmed, the court will not permit judgment to be entered *nunc pro tunc*.
Bates v. *Lockwood*. 1 T. R. 637

34. But if the action be brought on a judgment recovered in the Common Pleas, the court will not stay proceedings pending a writ of error without the defendant's giving judgment in the second action. 1 T. R. 637

35. See the difference of the form of the recognizance on writs of error in *Cam. Scac.* and *B. R.* 2 T. R. 59, *n.*

36. A rule for setting aside an execution, sued out after the allowance of a writ of error, discharged without costs, the writ of error having been taken out against good faith.
Cates v. *West*. 2 T. R. 183

37. If the plaintiff recover a judgment against two defendants in *B. R.*, and one of them bring a writ of error in *Cam Scac.* the plaintiff cannot charge the other defendant in execution till the record be remitted into the Court of *B. R.* notwithstanding the writ of error might have been quashed immediately, because not brought by both defendants. *Laroche* v. *Washborough and Mailand*. 2 T. R. 737

38. The court will set aside a *testatum capias ad satisfaciendum*, sued out without an original *capias* to warrant it, though a writ of error has been brought, if a *capias ad satisfaciendum* have been afterwards sued out, returned and entered on the roll.
Mistead v. *Coppard*. 5 T. R. 242
(See AMENDMENT II.

III. *Proceedings and Judgment in.*

1. On writs of error, the question whether the Judges below were properly constituted cannot be entered into: it is sufficient that they were judges *de facto* in a court having jurisdiction of the subject matter.
Milward v. *Thatcher*. 2 T. R. 87

2. If judgment be given for the plaintiff on one count in a declaration, and a distinct judgment for defendant on another, and the defendant bring a writ of error to reverse the judgment on the first count, the Court of Error cannot examine the legality of the judgment on the second count, no error being assigned on that part of the record. *Campbell* v. *French, (in error.)* 6 T. R. 200

3. When a record is removed here from a county palatine court by a writ of error, and that writ is *non-prossed*, this court will award execution.
Cowperthwaite v. *Owen*. 6 T. R. 657

4. If there be a bill of exceptions to the rejection of evidence in the Court of Great Sessions in *Wales*, and upon error in K. B. the evidence is deemed admissible, the Court of K. B. will award a *venire de novo* into the next *English* county.
Davis v. *Pierce*. 2 T. R. 125

5. The Court of Exchequer Chamber is bound to allow double costs to the

defendant in error, on the affirmance of a judgment of the King's Bench.

Shepherd v. *Mackreth*. 2 H. B. 284

6. But it is entirely a matter in the discretion of that court, whether *interest* shall be allowed or not, on such affirmance. 2 H. B. 284

7. And upon the affirmance of a judgment for the plaintiff, in an action upon an attorney's bill, they will not allow interest. *Walker* v. *Bayley (in error)*. 2 B. & P. 219

8. The Court of Exchequer Chamber will allow interest to a defendant in error, under stat. 3. *H.* 7. *c.* 10. on a judgment of non-pros as well as on a judgment of affirmance. Note; for the future the interest allowed will be *5l. per cent.* instead of *4l.* *Sykes* v. *Harrison (in error)*. 1 B. & P. 29

9. Where judgment for the defendant on a special verdict is reversed in the Exchequer Chamber, that court, on motion, will give a final judgment for the plaintiff. *Denn d. Mellor* v. *Moore (in error)*. 1 B. & P. 30

10. Judgment having been given in C. P. for plaintiff on a special verdict in assumpsit, which was reversed on writ of error in K. B. the defendant is entitled there not only to judgment of acquittal, but also for the costs of his defence in C. P., being the same judgment which the court below ought to have given: defendant in such case being entitled to his costs by stat. 23. *H* 8. *c.* 15.

Gildart v. *Gladstone*. 12 E. R. 668

ESCAPE.

1. A bailiff, who has arrested a prisoner on mesne process, may retake him before the return of the writ, though he voluntarily permitted the prisoner to escape immediately after the arrest.

Atkinson v. *Matteson*. 2 T. R. 172

(See also title ARREST II.)

2. A voluntary return of a prisoner, after an escape, before action brought, is equal to a retaking on a fresh pursuit; but it must be pleaded. 2 T. R. 126

3. A plea that *if* the prisoner escaped several times (without specifying them) he returned as often, is bad. 1 B. & P. 413

(See PLEADING IV.)

4. Under a count for a *voluntary* escape, the plaintiff may give evidence of a negligent escape; and the defendant may plead a retaking on a fresh pursuit to such a count, without traversing the voluntary escape. 2 T. R. 126

5. An escape from the rules of the King's Bench prison without the marshall's knowledge, is not a voluntary escape. 2 T. R. 126

6. If a sheriff, having arrested a defendant on mesne process, keep him in his custody after the return of the writ, and then carry him to prison, he is not liable to an action on the case as for an escape; if the jury find that the plaintiff has not been delayed or prejudiced in his suit.

Planck v. *Anderson*. 5 T. R. 37

7. If a sheriff's officer, having taken a prisoner in execution, permit him to go about with a follower of his before he takes him to prison, it is an escape. *Qu.* Whether it would not have been an escape also, if the officer himself had accompanied him?

Benton v. *Sutton*. 1 B. & P. 24

8. The bailiff of a liberty, who has the return and execution of writs, is liable to an action of debt for an escape, if he remove a prisoner, taken in execution to the county gaol, situate out of the liberty, and there deliver him into the custody of the sheriff.

Boothman v. *Surrey (E.)* 2 T. R. 5

9. An administratrix may maintain an action in her own name against the marshal for the escape of a prisoner who is in execution on a judgment obtained by her as administratrix. 2 T. R. 126

10. An action of *debt* will lie against a gaoler for the escape of a prisoner in execution, though the escape were without the knowledge or fault of the gaoler, who in such case can avail himself of nothing but the act of God, or the king's enemies, as an excuse.

Alsept v. *Eyles*. 2 H. B. 108

11. In debt against a sheriff or gaoler for an escape of a prisoner in execution, the jury cannot give a less sum than the creditor would have recovered against the prisoner, namely, the sum indorsed on the writ, and the legal fees of execution.

Bonafous v. *Walker*. 2 T. R. 126

12. In an action against the sheriff for the escape of a prisoner on mesne process, the plaintiff was nonsuited, because he could not prove any debt against the prisoner who escaped.

Alexander v. *Macauley*. 4 T. R. 611

13. *B.* being custody at the suit of *A.* in a joint action against *B.* and *C.*, *B.* justifies bail in an action entitled by mistake "*A.* against *B.*" only, and a rule so entitled is served on the marshal of K. B. who thereupon discharges *B.* out of custody, he not being charged in custody in any more than one action at the suit of *A.*: held that the marshal was liable in an action for an escape.

White v. *Jones.* 5 E. R. 292

14. In an action against the marshal for an escape, it being alleged in the declaration that the prisoner was arrested on mesne process, and brought before a judge at chambers by virtue of a writ of habeas corpus, and was by him thereupon *committed* to the custody of the marshal, *as by the record thereof now remaining in the Court of K. B.* appears, &c. such allegation is either impertinent and surplusage; (for properly speaking, such documents are not *records* nor capable of becoming so) or, considering them as *quasi of record*, the allegation is sufficiently proved by the production of them from the office of the clerk of the papers of the K. B. prison, with whom they were properly deposited.

Wigley v. *Jones.* 5 E. R. 440

15. In an action for an escape out of execution the declaration alleged that the prisoner was, by *habeas corpus*, brought before a judge of K. B. and by him committed to the custody of the marshal, "as by the said writ of *habeas corpus*, and the said commitment thereon now remaining in the said court more fully appears;" held that evidence of a commitment by a judge of K. B. but not filed of record, would not support the action.

Turner v. *Eyles.* 3 B. & P. 456

16. Held also that the above allegation (even if unnecessary) must be proved as laid. *ib*

ESSOIGN.

1. If on the return of a writ in a personal action the defendant cast an essoign, which is not adjourned to a particular day, and it is not quashed, and the plaintiff deliver his declaration on the first day of the following term, the defendant is not entitled to an imparlance. *Rooke* v. *The Earl of Leicester.* 2 T. R. 16

2. When a corporation are defendants, they are not entitled to an essoign.

Argent v. *The Dean and Chapter of St. Paul's.* 2 T. R. 16, *n.*

3. There cannot be an essoign in a personal action. 2 T. R. 16

4. Where an essoign is not adjourned to a particular day, and no motion made to quash it, the declaration cannot be delivered till the first day of the term. 2 T. R. 16

5. The essoign day is considered for many purposes the first day of the term. *Belk* v. *Broadbent.* 3 T. R. 185

6. And if a writ be pleaded as sued out on a day between the essoign day and the first day of the term, and there be a special demurrer for that cause, the objection will not prevail, though the court do not in fact sit till the *quarto die post.* 3 T. R. 185

ESTOPPEL.

1. In general the grantor is estopped by his deed to say he had no interest.

Fairtitle d. Hylton v. *Gilbert.* 2 T. R. 171

2. But that principle does not apply where the grantor is a trustee for the public. 2 T. R. 171

3. Still less can it apply where the trustee, deriving his authority under a public act of parliament, grants that which the act does not empower him to do. 2 T. R. 171

4. Therefore where the trustees of a public turnpike act were empowered to erect toll-houses and mortgage the *tolls*, and it was declared that there should be no priority among the creditors, it was determined that they have no power to mortgage the *toll-houses* or *gates*, and that if in fact they have made such a mortgage, and an ejectment is brought against them by the mortgagee, they are not estopped by their deed from insisting that the act gave them no such power. 2 T. R. 169

5. Debt on bond, conditioned for the performance by *R. G.* of all the covenants on his part mentioned in a certain indenture, bearing even date with the bond, made or expressed to be made between the plaintiff and the said *R. G.*: plea, that before the execution of the bond it was agreed that the plaintiff should grant to *R. G.* a lease under certain covenants, and that the defendant should enter into a bond as security for the performance of these covenants: that the defend-

ant did accordingly enter into the bond on which the action was brought, but that the indenture mentioned in the condition thereof is the lease so agreed upon, and no other, but that the said lease never was executed: held on demurrer, that the defendant was estopped by the condition of the bond from pleading this matter.

Hosier v. *Searle.* 2 B. & P. 299

6. If the heir apparent of a *copyholder* in fee surrender in the lifetime of his ancestor, *and survive him*, the heir of such surrenderor is not estopped by that surrender of his ancestor from claiming against the surrenderee.

Goodtitle v. *Morse.* 3 T. R. 365

7. Whether in the case of a freehold estate, if the heir had made a feoffment under such circumstances, his heir would not be estopped? *Qu.* 3 T. R. 365

8. Where a person held under a lease from a tenant for life, in which the reversioner, who was then under age, was named, but it was not executed by him till after the death of the tenant for life; *quære*, How far the lessee might have been estopped in an action of covenant brought by the reversioner if he had not himself shewn these facts by his declaration?

Ludford v. *Barber.* 1 T. R. 86

9. *A.* asserting that he had a right to a patent machine, covenanted with *B.* that he should use it it in a particular manner, in consideration of which *B.* covenanted that he would not use any other; in an action by *A.* on the covenant, *B.* is not estopped by his covenant from pleading in bar to the action, *that the invention was not new, or that the patentee was not the inventor:* but he may thus shew that the patent was void, and consequently that there was no consideration to him.

Hayne v. *Maltby.* 3 T. R. 438

10. But in an action by the assignee of the patentee against the patentee himself, he is estopped from shewing that it was not a new invention against his own deed. *Oldham* v. *Langmead, Sitt. after Trin.* 1789, *cor. Lord Kenyon.* 3 T. R. 439 & 441

11. If a verdict be found on any fact or title, distinctly put in issue in an action of trespass, such verdict may be pleaded by way of estoppel in another action between the same parties or their privies, in respect of the same fact or title.

Outram v. *Morewood.* 3 E. R. 346

12. Devisees of contingent remainders in a copyhold, not being in the seisin, cannot make a surrender of their interest; nor will such a surrender operate by estoppel against the parties or their heirs.

Doe d. Blacksell & al. v. *Tomkins.* 11 E. R. 185

13. The plaintiffs, a Frenchman and a Swiss, carrying on trade at Lisbon under the name of the defendant, a Portuguese, shipped a cargo from thence to a port of France, which cargo being captured by a British cruiser, and libelled for condemnation in the Court of Admiralty as French and enemy's property, was ordered to be restored to the defendant on his putting in and establishing, with the plaintiff's privity and consent, a claim to it as his own property: the Court of K. B. held that the plaintiffs were, by thus colluding with the defendant to withdraw from the Admiralty the decision of the then question, by establishing a false fact, estopped from maintaining an action for money had and received against the defendant for the proceeds by shewing the true fact that the property was their own, and that the defendant was their agent. *De Metton & al.* v. *De Mello.* 12 E. R. 234

14. Plaintiff agreed to serve as a seaman during a voyage to and from the West Indies: on his arrival there he was claimed as a runaway slave, and delivered up to his master; whereupon it was agreed between the plaintiff, his master, and the captain, that upon payment of a sum of money by the captain unto the master, the latter should manumit the plaintiff, he covenanting to serve the captain as a seaman for three years, at certain stipulated wages; plaintiff was accordingly manumitted, and having served the captain on the homeward voyage, brought an action against him to recover wages for that voyage on a *quantum meruit:* held that he was estopped by his covenant from claiming more than the sum stipulated.

Williams v. *Brown.* 3 B. & P. 69

EVIDENCE.

I. *Conclusive;* or *prima facie.*

1. A receipt is not conclusive evidence against the party signing it; but he may shew that he did not receive the sum or thing in question.

Stratton v. *Rastall.* 2 T. R. 366

2. Where there is a promise to pay a bill of exchange, unless within a fixed time proof be produced of its being already paid, though the promise be broken, (no proof being brought within the time), and the plaintiff in an action on the bill give evidence (under a count on *insimul computassent*) of the special promise; yet the defendant may also prove under that count, that the debt for which the bill was originally given was paid; and thereby avoid the promise by shewing that it was without consideration.

Elmes v. *Wills.* 1 H. B. 64

3. Upon a libel in the Consistorial Court for disturbance in the plaintiff's right to a pew, the court adjudged *the right* to be in the plaintiff, and admonished the defendant not to sit in the pew; the Court of Archers *reversed* the sentence, but also admonished the defendant not to use the pew again: these sentences were held *not conclusive evidence* of the plaintiff's right in an action for a disturbance between the same parties.

Cross v. *Salter.* 3 T. R. 639

4. A judgment of ouster against one corporator is conclusive evidence against another who derives title under him.

R. v. *The Mayor of York.* 5 T. R. 66

5. If to an action brought by a creditor of a testator, the executrix plead judgments recovered, and no assets beyond, &c.; to which the plaintiff replies *per fraudem* generally; it is not conclusive evidence of fraud, that the judgments as pleaded were confessed for more than the just debts; but the defendant may shew that they were entered up by mistake for more than was due, and that that was made known to the plaintiff before the action was brought.

Pease v. *Naylor.* 5 T. R. 80

6. In an action on an attorney's bill, the *nisi prius* roll is good *prima facie* evidence that the action was not commenced till the expiration of a month after the delivery of the bill.

Webb, one, &c. v. *Pritchett.* 1 B. & P. 263

7. The examination of a pregnant woman, taken before a justice of peace under stat. 6. *G.* 2. *c.* 31., is admissible evidence on an application to the Quarter Sessions to make an order of filiation on the putative father, if the woman die before such application is made; and if not contradicted, ought to be conclusive. *R.* v. *The Inhabitants of Ravenstone.* 5 T. R. 373

8. In an action against *A.* for enticing the servant of *B.* from his service, it is sufficient evidence of the enticement, that *A.* asked the servant to enlist in the army, and afterwards gave him money.

Keane v. *Boycott.* 2 H. B. 511

9. *Qu.* Whether a judgment of acquittal *in rem* in the Exchequer, is conclusive as to the illegality of the seizure of the goods in a subsequent action to recover them from the seizing officer.

Cooke v. *Sholl.* 5 T. R. 255

10. A judgment of condemnation *in rem*, in such case is conclusive.

5 T. R. 255

11. A conviction of a justice of peace having competent jurisdiction, upon which the plaintiff was arrested and imprisoned, is, till reversed or quashed, conclusive evidence in favour of the justice against whom an action of trespass and false imprisonment was brought. *Strickland* v. *Ward, Winchester Sum. Ass.* 1757, *cor. Yates* J. 7 T. R. 633, *n.*

12. An inquisition made by the sheriff's jury to ascertain the property of goods taken under a *fi. fa.* though found in favour of *A.* is not admissible evidence in an action of trover for the goods brought by *A.* against the sheriff.

Lathow v. *Eamer & al.* 2 H. B. 437

13. Where a case from the sessions only stated the bare fact of a pauper's having received relief from the respondent's parish, it was holden that this was not even *prima facie* evidence of a settlement there; since he might have been relieved as casual poor, which the overseers were bound to do if wanted, whether the pauper were settled there or not. *R.* v. *The Inhabitants of Chadderton.* 2 E. R. 27

14. Upon an issue taken (in an action of debt on bond to secure an annuity) in general terms without reference to the annuity act, upon a traverse that the consideration-money was not paid *by the grantee* to the use of the grantors; evidence that it was so paid *by*

the grantee's agent will sustain the affirmative of the issue.

Coare v. *Giblett*. 4 E. R. 85

15. In an action on a policy, the property of the ship may be proved by parol evidence of the possession of the assured, unless disproved by the production of the written documents of the ship under the register acts. And held that such parol evidence of ownership, arising from possession at a particular period, was not disproved by shewing a prior register in the name of another, and a subsequent register to the same person.

Robertson & al. v. *French*. 4 E.R. 130

16. An averment that the plaintiff was ready and willing to transfer, and requested the defendant to accept stock, can only be satisfied by shewing an actual tender and refusal, or that the plaintiff waited at the bank on the day when it was understood that the transfer was to be made, until the close of the transfer-books, which was the latest time when it could be made.

Bordenave v. *Gregory*. 5 E. R. 107

17. An averment that stock was to be transferred *on request* is not proved by evidence that it was to be transferred on a *certain day*.

Bordenave v. *Bartlett*. 5 E. R. 111

18. The publisher of a public register receives an anonymous letter, tendering certain political information on *Irish* affairs, and requiring to know to whom his letters should be directed; to which an answer is returned in the register; after which he receives two letters in the same hand writing, directed as mentioned, and having the *Irish* postmark on the envelopes; which two letters were proved to be in the handwriting of the defendant; the previous letter having been destroyed: This is a sufficient ground for the Court to have the letters read; and the letters themselves containing expressions of the writer indicative of his having sent them to the publisher of the register *in Middlesex*, for the purpose of publication, the whole is evidence sufficient for the jury to find a *publication* by the procurement of the defendant *in Middlesex*.

R. v. *Hon. R. Johnson*. 7 E. R. 65

19. Where the plaintiff declares upon a *quantum meruit* for work and labour done, and materials found, it is competent to the defendant, even without notice to the plaintiff, to prove that the work done was not worth so much as the plaintiff claims. And if it appear that the plaintiff had been paid on account as much as the work was worth, he cannot recover. And so it seems that the defendant may be let into such a defence where the contract was for the work to be done at a certain price; at least if he give the plaintiff previous notice of such defence, that he may be prepared to meet it. And, if the work done be wholly inadequate to answer the purpose for which it was undertaken to be performed, it appears that the defendant may be let into such defence even without notice.

Basten v. *Butter*. 7 E. R. 479

20. In case against a judgment creditor for maliciously suing out an *alias fi. fa.* after a sufficient execution levied upon the plaintiff's goods under the first *fi. fa.* held that the sheriff's return indorsed upon the two writs (which writs had been produced in evidence by the plaintiff as part of his case,) wherein the sheriff stated that he had forborne to sell under the first, and had sold under the second writ, by the request and with the consent of the now plaintiff, were *primâ facie* evidence of the facts so returned; credence being due to the official acts of the sheriff between third persons.

Gyfford v. *Woodgate*. 11 E. R. 297

21. An affidavit made and signed by the printer and publisher and proprietor of a newspaper as required by stat. 38 *G.* 3. *c.* 78., which affidvit contained the names of the parties, the place where the paper was printed, and the title of it; together with the production of a newspaper, tallying in every respect with the description of it in the affidavit; is not only evidence, by that act, of the publication of such paper by the parties named, but is also evidence of its publication in the county where the printing of it is described to be: and this upon the trial of an information for a libel contained in such newspaper.

R. v. *Hart and White*. 10 E. R. 94

II. *Court-Rolls, Public Books, &c., when and how admissible in Evidence.*

1. An entry in the court-rolls of a manor, stating the mode of descent of lands in the manor, is admissible evidence of the mode of descent although no instances of any person having taken according to it be proved.
Roe d. Beebee v. *Parker.* 5 T. R. 26

2. A customary of a manor, appearing to be of great antiquity, and delivered down with the court-rolls from steward to steward, although not signed by any person, is good evidence to prove the course of descent within the manor. *Denn d. Goodwin & Wragg et Ux.* v. *Spray.* 1 T. R. 466

3. Where the right to the soil is in issue, entries written in a book by the steward of a former owner, from whom title is derived of receipts of money, by the steward for that owner, as a satisfaction for trespasses committed on the place in question, are admissible evidence if the steward be dead.
Barry v. *Bebbington.* 4 T. R. 514

4. So an entry of the receipt of money by officers of a township from the officers of another township of a proportion of church rates made in a parish book, is evidence to charge the latter officers with the same proportion in future.
Stead v. *Heaton.* 4 T. R. 669

5. And another entry, explaining the proportions, made on the same page, is also admissible evidence. 4 T. R. 669

6. Entries made by a third person deceased, in his books of receipts of rent from his tenant for a particular estate, are not evidence to prove the identity of the land in a cause between two others.
Outram v. *Morewood.* 5 T. R. 121

7. A verdict against one defendant in trespass upon an issue of a justification of a *public* right of way, negativing such right, is evidence in trespass for breaking and entering the same close against another defendant, who justified under the same right. And the latter cannot shew that such verdict was entered upon that particular plea by mistake of the officer, there having been no evidence given on either side in respect of that issue on the former trial; the record being conclusive as to the fact of such a finding, though not as to the truth of it between other parties. *Read* v *Jackson.* 1 E. R. 355

8. Reputation would be evidence as to the right of way in such case. *ib.*

9. The prison books of the *Fleet* and *King's Bench* prisons, though admissible evidence to prove the period of the commitment and discharge of a prisoner, are not admissible to prove the cause of his commitment.
Salte v. *Thomas.* 3 B. & P. 188

10. The original book of acts, directing letters of administration to be granted, with the surrogate's fiat for the same, is evidence of the title of the party to whom the administration is directed to be granted of the intestate's effects, without producing the letters of administration themselves; notwithstanding subsequent letters of administration granted to another, the first not being recalled.
Elden v. *Keddell.* 8 E. R. 187

11. Upon a question whether certain ancient books, from 1586 to 1693, preserved in the archives of the dean and chapter of *Exeter*, entitled *Rentals*, and containing columns of the names of their estates, with the rents reserved on each, and *solvits* written in different hand-writing against such rents, were entries made by the receivers of the dean and chapter, charging themselves with the receipt of the rents, parol evidence cannot be received to prove them to be receivers' books, by shewing that the receivers of the dean and chapter for the last sixty years had kept their books of accounts in the same form.
But it appearing that some of the entries in such books, (though not the entries as to the rent of the estate in question) contained internal evidence of their being the books of receivers, by such entries as "solvit *mihi;*" and "solvit *per me,*" signed with the initials N. W.; which entries imported that N. W. was therein accounting to the dean and chapter for money paid to himself, and with the receipt of which he debited himself: the Court of K. B. directed a new trial in order to have the inspection of the books again submitted to the judge at *Nisi Prius. Doe d. Webber* v. *Thynne (Ld.)* 10 E. R. 206

12 To prove a copy of a record, it is sufficient to prove that the paper agrees with what the officer of the court read as the contents of the record: it is not necessary for the persons examining to exchange papers and read them alternately. *Rolf* v. *Dart.* 2 W. P. T. 52

13. Parchment writings preserved among the muniments of a manor, purporting to be signed by several copyholders of the manor, stating an unlimited right of common in the commoners, which having been found inconvenient, they had agreed to stock the common in a restricted manner, were admitted by the Court of K. B. as evidence of reputation as to the general right of common.
Chapman v. *Cowlan.* 13 E. R. 10

14. Proof of a curacy *augmented* is made by shewing an order for the augmentation of it, entered in a book, and signed by the governors of Queen *Anne*'s bounty, according to stat. 1 *G.* 1. *st.* 2. *c.* 10. § 20.; without going on to prove that the money was afterwards laid out in land, and allotted by deed under the corporation seal of the governors to be annexed to the curacy, and that such deed was enrolled within six months after its execution, according to that statute § 21. and 9 *G.* 2. *c.* 36.
Doe, d. Graham, v. *Scott.* 11 E. R. 478

15. The judgment book is no evidence of the judgment entered therein, though the record has not been made up, and though the person interested in proving the judgment be no party to the action.
Ayrey v. *Davenport.* 2 N. R. 474

16. The entry in the register book of the custom-house of the certificate of a transfer of a vessel to a particular person is not even *prima facie* evidence for a stranger to charge that person as owner unless the entry be shewn to be made by the authority of the person named in it.
Frazer v. *Hopkins & al.* 2 W. P. T. 5

III. *Custom; of Evidence to support.*

1. An allegation, in an action for a false return to a *mandamus*, of a custom of payment by the chapelwardens of *A.* to the *churchwardens* of *B.*, may be supported by evidence of a custom of payment to officers acting only for the *township* of *B.*, not co-extensive with the parish of *B.*, but who have always been described as the churchwardens of *B.* 4 T. R. 669

2. A claim of toll to be taken in specie *for goods sold in a market*, is supported by evidence of a right to toll for goods *brought into the market, and there sold;* without shewing any right to toll for goods sold in the market without being brought there.
Maseley, Bart. v. *Pierson.* 4 T. R. 104

3. A sale of goods in a market in such a case implies that the goods are actually there. 4 T. R. 104

4. Plea (to trespass), that an ancient messuage and 12 acres of land were immemorially parcel and a customary tenement of the manor of *A.*: and that there is a custom in the manor, "that from time whereof, &c. the customary tenant of the said customary tenement, for all the time aforesaid has had right of common," &c.; replication, traversing the custom: on these pleadings the plaintiff may prove that the messuage was built within 20 years and not upon the scite of an ancient house. *Dunstan* v. *Tresider.* 5 T. R. 2

5. Evidence of reputation of the custom of a manor that in default of sons, *the eldest daughter*, and in default also of daughters, the *eldest sister*, and in case of the death of all the descendants of the eldest daughter or sister, the descendants of the other daughters or sisters respectively of the person last seized should take; is proper to be left to the jury of the existence of such a custom as applied to a great nephew (the grand-son of an eldest sister) of the person last seized; although the instances in which it was proved to have been put in use extended no further than those of eldest daughter and eldest sister, and the *son* of an eldest sister: the existence of such extended custom in adjacent manors seems to be no evidence of the custom in the particular manor. *Doe d. Foster & al.* v. *Sisson.* 12 E. R. 62

IV. *Deeds, Papers, Private Accounts Books, &c.; when and how far admissible Evidence.*

(See also title INSPECTION, &c.)

1. A deed coming out of the hands of the opposite party after notice to produce it, must *prima facie* be taken to be duly executed, and will be received in evidence without proof of the execution. *R.* v. *The Inhab. of Middlezoy.* 2 T. R. 41

2. But where an instrument was produced at the trial by one of the parties, in consequence of notice from the other; which when produced appeared to have been executed by the party producing it, and third persons, and to be attested by a subscribing witness; the Court of K. B. held that the production of it in that manner, did not dispense with the re-

cessity of proving the instrument by means of the subscribing witness, though unknown before to the party calling for it.

Gordon v. *Secretan.* 8 E. R. 548

3. The mere production in court of a diploma of Doctor of Physic under the seal of one of the Universities, is not in itself evidence to shew that the party named in the diploma is entitled to that degree.

Moises v. *Thornton.* 8 T. R. 303

4. Action for these words spoken by defendant of the plaintiff in his profession of a physician. Dr. *S.* has upset all we have done, and die he (the patient) must." It was proved that the plaintiff had practised several years as a physician, and having been called in during the absence of a physician, who with the defendant, attended the patient, the defendant as apothecary made up the medicines prescribed by the plaintiff for the patient in question. *Qu.* Whether, on this declaration it was necessary for the plaintiff to produce a diploma, or other direct evidence that he had taken a degree in physic, in order to maintain the action? *Smith* v. *Taylor.* N. R. 196

5. In an action on a foreign judgment, it is not sufficient to prove the judge's hand-writing subscribed to it, without proving that the seal affixed thereto is the seal of the court.

Henry v. *Adey.* 3 E. R. 221

6. If the plaintiff's attorney, previously to bringing an action for a distress under the warrant of a magistrate make out two papers precisely similar, purporting to be demands of a copy of the warrant pursuant to 24 *G.* 2. *c.* 44. § 6. and having signed both for his client deliver one to the defendant, the other is sufficient evidence at the trial.

(Dissentiente Rooke J.)

Iory v. *Orchard.* 2 B. & P. 39

7. A copy of an attorney's bill, the original of which has been delivered to the defendant, may be admitted in evidence without proof of notice to produce the original.

Anderson v. *May.* 2 B. & P. 237

8. And is conclusive as to the reasonableness of the *items.* *ib.*

9. In trover, for the certificate of a ship's registry, the certificate may be proved by the production of the registry from which is was copied, though no notice has been given to produce the certificate itself.

Bucher v. *Jarratt.* 3 B. & P. 143

10. A rector may recover in ejectment against his lessee on the ground of the lease of the rectory being avoided on account of his own non-residence, by force of the stat. 13 *Eliz. c.* 20. and the lease to the defendant describing him as doctor in divinity produced by him at the trial in support of his title, is *prima facie* evidence of his being such as he is therein described to be so as also to avoid the lease under the stat. 21 *H.* 8. *c.* 13. § 3. *Throgmorton d. Fleming* v. *Scott.* 2 E. R. 467

(See EJECTMENT I. 27.)

11. An averment in a declaration on the stat. 8 *Ann. c.* 9. against the master of an apprentice for not inserting the true consideration in the indenture, "that *A. B.* the apprentice, by a certain indenture, executed on, &c. put himself apprentice to the defendant," &c. may be proved by the production of that part of the indenture executed by the defendant, in which it is recited that *A. B.* had put himself apprentice, &c.

Burleigh v. *Stibbs.* 5 T. R. 465

12. So in ejectment upon a clause of re-entry in a lease against the assignee of a lease, proof of the counterpart by the subscribing witness is sufficient evidence against the assignee of his holding upon a condition of re-entry (contained in the original lease) in case of non-payment of rent.

Roe d. West v. *Davis.* 7 E. R. 363

13. There is no difference between civil actions and criminal prosecutions as to the evidence of papers. In neither case is the party bound to produce evidence against himself; but even in a criminal prosecution notice may be given to him to produce papers in his possession, and in case of his refusal or neglect, other evidence may be given of their contents.

The Attorney General v. *Le Merchant, Exch.* 2 T. R. 201 *n.*

14. And notice to the defendant's agent or attorney in such case is sufficient.

2 T. R. 201

15. In trover by the assignees of a bankrupt to recover goods taken by the defendant under a fraudulent bill of sale given by the bankrupt to the defendant; (and which was an act of bankruptcy,) the defendants examination before the commissioners, in which he admitted the execution of thee deed, is sufficient evidence to

prove the execution, and supersedes the necessity of calling the subscribing witness.

Bowles v. *Langworthy*. 5 T. R. 366

16. The plaintiff's agent shewed to the defendant, an under-writer, the captain's protest, containing an account of the loss of the ship insured, demanding payment; held that this did not entitle the defendant to read the protest in evidence in an action on the policy.

Senat v. *Porter*. 7 T. R. 158

17. A bill in Chancery is no evidence of the facts contained in it, not even of those on which the prayer of relief is founded.

Doe d. Bowerman v. *Sybourn*. 7 T. R. 2

18. Except in the instance of a bill filed by an ancestor, which may be evidence of a family pedigree therein set forth. *Taylor* v. *Cole, cor. Lord Kenyon, H.* 1789, *cited* 7 T. R. 2, *n.* (*a*)

19. Where the plaintiff entered an account in writing of goods and cash furnished to the defendant from time to time, each page of which was authenticated by the defendant's acknowledgment in writing of the receipt of the contents; though such an acknowledgment in writing cannot be given in evidence *per se*, in respect to the cash items, amounting to above 40*s.* in each page, for want of a receipt stamp, yet it is competent to the plaintiff to prove that upon calling over each article to the defendant, he admitted that he had received the same; and the witness may refresh his memory by referring to the accounts

Jacob v. *Lindsay*. 1 E. R. 460

20. Where *A.* being tenant for life, with a limited power of leasing, reserving the *ancient* rent, received a letter from a confidential agent in 1728, containing a minute account of the tenants and rents of the estate, which letter *A.* indorsed *A Particular of my Estate*, &c.; and handed down to *B.* the succeeding tenant for life, by whom it was preserved and handed down amongst the muniments of the estate, to the first tenant in tail: such letter was held to be good evidence for the tenant in tail against the lessee of *B.*, in order to shew that the rent reserved by *B.* was less than the *ancient* rent reserved at the time to which such account referred. *Roe d. Brune. (Clk.)* v. *Rawlings*. 7 E. R. 279

21. The entries by *A.* in his account book of the receipt of rent to the amount stated, are also evidence of the same fact. 7 E. R. 279

21. Where a corporation declaring in covenant by their modern name, stated that the citizens, &c. were from time immemorial incorporated by divers names of incorporation, and at the time of making the indenture by *A. B.* which they declared on, were known by a certain other name, by which name *A. B.* granted to them a certain watercourse, and covenanted for quiet enjoyment: held that the deed granting the watercourse to them by such name was evidence as against the defendants, who claimed under the grantor, that the corporation was known by that name at the time, upon an issue taken on that fact. *Mayor, &c. of Carlisle* v. *Blamire*. 8 E. R. 487

22. If a person have peculiar means of knowing a fact, and make a declaration and written entry of that fact, which is against his interest at the time; it is evidence of the fact, as between third persons after his death, if he could have been examined to it in his lifetime; and therefore an entry made by a man-midwife in a book, of having delivered a woman of a child on a certain day, referring to his ledger in which he had made a charge for his attendance, which was marked as *paid*, is evidence upon an issue as to the age of such child at the time of his afterwards suffering a recovery.

Higham v. *Ridgway*. 10 E. R. 109

23. A certain paper being found along with other papers relating to the private concerns of the person last seised, after his death, in a drawer in his house; which paper purported to be the will of a person answering the description of his grandfather, made in 1738, but which was found cancelled, and no evidence was given of its ever having been acted upon, or probate of it taken out; is yet evidence of its recognition by the party last seised, as the declaration of his ancestor concerning the state of his family, so as to let in the contents of it for the purpose of shewing that that ancestor acknowledged a brother of the name of *Thomas* to be older than another brother of the name of *William*; assuming the jury to be satisfied of the fact, that the paper so found was kept there

by the person last seised with a knowledge of its contents, and that no imposition was practised.

Doe, Lessee of Johnson, v. *the Earl of Pembroke*. 11 E. R. 504

25. In an action for money had and received, if the defendant shews a deed of assignment of the money to himself and a receipt for the consideration money indorsed, it is a good discharge, though no money passed at the time, and though there are pregnant evidences of suspicion that the consideration is falsely recited, and that the money never was paid.

Rowntree v. *Jacob*. 2 W. P. T. 141

26. Upon a devise to the testator's wife of all his wines, &c. for housekeeping, *in addition to the settlement* he had made her upon his *copyhold* estate; and to his niece *M.* the rents and profits of his new inclosed *freehold* cow pasture in *North Collingham*, during the life of his wife; and then to two nephews all his *personal* estate, to be divided between certain nephews and nieces, and their sons and daughters: and *after the decease of his wife*, he devised to the same two nephews all his furniture, plate, &c. and "all his *copyhold* estates *in North and South Collingham*," and all other his *personal* estate, to sell and divide amongst his nephews and nieces, &c., including *T. B.* who, he declared, should be an equal sharer in this division of *his real* and personal estate: held that extrinsic evidence could not be given, that the settlement on his wife included a certain *freehold* close, mistakenly there enumerated as one of several *copyhold* closes settled, and which was in fact intermingled with the copyholds, (as were were also some other freehold closes, the bounds of which were no longer distinguishable from the copyhold, and all of which freeholds were included in the settlement;) for the purpose of shewing that by the devise of "all his *copyhold* estates *in North and South Collingham*," *after his wife's decease*, in trust to be divided, &c. the *freehold* close in question passed; as meant to include all his *real* estate *in settlement* upon his wife, and *which settlement was referred to* in the first devise to the wife. And as the settlement which was thus referred to in the former part of the will was not evidence for that purpose, so neither were other instruments and papers, not referred to, admissible for the same purpose; such as, 1. A bond of the same date with the settlement, and in aid of it, speaking only of *copyhold* to be settled; 2. The rough draught of the settlement altered by the testator; 3. A book indorsed "*Collingham* estate survey," kept with the muniments of his property, and including the freehold in question, without distinguishing it from the copyhold closes; and 5. A rental kept in the same place, and on which was indorsed by the testator, that "all the "rents of the *copyhold* lands in *North* "and *South Collingham*, &c. were "settled on his wife for life." *Doe d. Brown & al.* v. *Brown & al.* 11 E. R. 441

V. *Handwriting.*

1. An instrument executed abroad, and witnessed by a foreigner residing there, may be proved by evidence of the handwriting of the witness and of the contracting party, but not by the latter alone.

Barnes v. *Trompowsky*. 7 T.R. 265

2. Every instrument, to the signing of which there is a witness, should be proved by that witness, if living, or by proving the hand-writing of the witness, in case he is domiciled in a foreign country, or in case he cannot be found, so that there may be a presumption of his death. 7 T. R. 266

3. The answer of the obligor of a bond to a bill filed for a discovery, in which he admitted the bond to have been executed by him, is only secondary evidence, and cannot be received as evidence, *per se* of the execution, without shewing that due diligence had been used to discover who the subscribing witness was, who was alleged to be unknown.

Call. Bart. v. *Dunning*. 4 E. R. 53

4. The Court of C. P. (*per Buller* J.) held that in debt on a bond executed abroad, where one of the attesting witnesses was dead and the other beyond the process of the court, it was sufficient to prove the hand-writing of the deceased witness, without proving the hand-writing of the other witness or of the obligor; the hand-writing of the attesting witness when proved being evidence of every thing on the face of the paper.

Adam & Ux. v. *Kerr*. B. & P. 360

5. If a subscribing witness to a deed be abroad, out of jurisdiction of the court, and not amenable to its process at the time of the trial, evidence of his hand-writing is admissible; though it do not appear whether he be domiciled or settled abroad.

Prince v. *Blackburn.* 2 E. R. 250

6. Where, in an action on a bond, evidence was offered that diligent inquiry had been made after one of the subscribing witnesses at the places of residence of the obligors and obligee, and that no account could be obtained of such a person, who he was, where he lived, or any circumstance relating to him; held sufficient to let in proof of the hand-writing of the other subscribing witness, who had since become interested as administratrix to the obligee, and was a plaintiff to the record. *Cunliffe* v. *Sefton.* 2 E. R. 183

7. If upon fair, serious, diligent inquiry, without evasion, an attesting witness to an intermediate assignment of a lease is not to be found, having absconded from his creditors, evidence of his hand-writing is admissible to prove the attestation.

Crosby v. *Percy.* 1 W. P. T. 364

8. If an attesting witness has set out to leave the kingdom, his absence is sufficiently accounted for, although in fact his vessel may unexpectedly have been beaten back into an *English* port by contrary winds, just at the time of the trial.

Ward v. *Wells.* 1 W. P. T. 461

9. A clerk of the post-office, accustomed to inspect franks for the detection of forgeries, may be examined as a witness to prove that the hand-writing of an instrument is an imitated, and not a natural hand, though he never saw the supposed person write; and also to prove that two writings, suspected to be imitated hands, were written by the same person. *Goodtitle d. Revett* v. *Braham, (trial at bar).* 4 T. R. 497

VI. *Hearsay Declarations, et parte Examinations, Confession, &c.*

1. *Qu.* If there be any other instance in which hearsay evidence is admissible but these two, namely, the cases of pedigrees and prescriptions?

3 T. R. 707

2. Declarations by tenants are admissible evidence after their death, to shew that a certain piece of land is parcel of the estate which they occupied; and proof that they exercised acts of ownership in it, not resisted by contrary evidence, is decisive.

Davies v. *Pierce.* 2 T. R. 53

3. Where the plaintiff claimed as devisee in remainder under a will 27 years ago, under which there was no possession, declarations by the tenant, who was in possession at that time, that he held as tenant to the devisor, are admissible evidence to prove seisin in the devisor.

Holloway v. *Rakes.* 2 T. R. 55

4. Whether the declarations of a pauper as to his settlement be admissible evidence to prove his settlement after his death? *Quære.* *R.* v. *The Inhabitants of Eriswell.* 3 T. R. 707

5. Neither the hearsay of a pauper who is dead, nor his *ex parte* examination in writing taken on oath before two magistrates, touching his settlement, are admissible evidence of such settlement. *R.* v. *Ferry Frystone (Inhab.)* 2 E. R. 54: *R.* v. *Chadderton (Inhab.)* 2 E. R. 27, and *R.* v. *Abergwilly (Inhab.)* 2 E. R. 64

6. Nor in case of his having absconded *R.* v. *Nuneham Courtney, (Inhab.)* 1 E. R. 373

7. Hearsay evidence of the declaration of a deceased father, as to the *place* of birth of his bastard child, is not admissible to prove the birth-settlement of such child.

R. v. *Inhab. of Erith.* 8 E. R. 539

8. The examination of a soldier, touching his settlement, which is made evidence by the mutiny act, must be authenticated before it can be received in evidence, and does not prove itself *primâ facie*, though the paper appear to be in the form prescribed by the stat.

R. v. *Belton (Inhab.)* 2 E. R. 13

9. *Semble*, the hand-writing of the magistrates signing the examination ought at least to be proved. *ib.*

10. In an action by the husband upon a policy of insurance on the life of his wife, declarations by the wife made by her when lying in bed apparently ill, stating the bad state of her health at the period of her going to *M.* (whither she went a few days before in order to be examined by a surgeon, and to get a certificate from him of good health, preparatory to making the insurance) down to that time, and her apprehensions that she could not live ten days longer, by which time the policy was to be returned, are admis-

sible in evidence to shew her own opinion, who best knew the fact of the ill state of her health at the time of effecting the policy, which was on a day intervening between the time of her going to *M.*, and the day on which such declarations were made; and particularly after the plaintiff had called the surgeon as a witness to prove that she was in a good state of health when examined by him at *M.*; his judgment being formed in part from the satisfactory answers given by her to his enquiries, and this being but a sort of cross-examination of her.

Aveson v. *Lord Kinnaird.* 6 E. R. 188

11. Declarations of a party accompanying an act done, and tending to explain such act, are evidence for the latter purpose, as part of the *res gestæ*. *ib.*

12. The hand-writing of one dead, who was an attesting witness to the supposed execution of a bond being proved in an action on the bond, *Heath* J. permitted the defendant to give in evidence that the deceased had in his dying moments acknowledged that he had been concerned in forging the bond, cited by Lord *Ellenborough*. (And see WITNESS III.) *ib.* 195

13. In an action by husband and wife in right of the wife as executrix, no declarations of the wife can be given in evidence by the defendant.

Alban v. *Pritchett.* 6 T. R. 680

14. The defendant may give in evidence the declarations or admissions of the plaintiff on the record to defeat the action, although such plaintiff appear to be only a trustee for a third person.

Bauerman v. *Radenius.* 7 T. R. 663

15. If a defendant give in evidence an answer in chancery of the plaintiff, it will not entitle the plaintiff to avail himself of any matters contained in such answer which are only stated as hearsay. *Semb. Roe d. Pellett* v. *Ferrars.* 2 B. & P. 548

16. A rated parishioner not being bound, upon an appeal touching the settlement of a pauper, to give evidence against his own parish, the opposite parish may give evidence of his declarations as to the facts in issue; the weight due to which must depend upon his means of knowledge as to the facts so declared, and the genuineness of the declarations, to be collected from circumstances.

R. v. *Inhab. of Hardwick.* 11 E. R. 578

17. Upon an issue between *A.* and *B.* whether *C.* died possessed of certain property, evidence may be given of declarations made by *C.* that she had assigned the property to *A.*

Ivat v. *Finch.* 1 W. P. T. 141

VII. *Parol, to explain written Instruments.* (And see DEVISE II. 40, &c.)

1. The breach of a covenant being assigned thus, "that the defendant had not used a farm in a husbandlike manner, but on the contrary had committed waste;" it was held that the plaintiff could not give evidence of the defendant's using the farm in an unhusbandlike manner, it not amounting to *waste*.

Harris v. *Mantle.* 3 T. R. 307

2. Plaintiff covenanted to build two houses for 5,000*l.* by a certain day, and averred in an action of covenant for the money, that the houses were built in the time; evidence that the time had been enlarged by *parol* agreement, and the houses finished within the enlarged time, cannot be received.

Littler v. *Holland.* 3 T. R. 590

3. The same in case of a bond.

3 T. R. 592, *n.*

4. But where the plaintiffs, having contracted by charter-party sealed, to let a ship, then in the Thames, to freight for eight months, from the day of her sailing from Gravesend, and that she should sail from the Thames to any British port in the Channel, to lade goods and sail to the West Indies, &c. afterwards agreed by parol that the ship should lade in the Thames, and that freight should commence from her entry outwards at the custom-house; the Court of K. B. held that the parol contract was distinct from and not inconsistent with that by deed, and might be enforced by action of assumpsit. *White & al.* v. *Parkin & al.* 12 E. R. 578

5. The verbal declarations or warranting of an auctioneer at the time of the sale, are not admissible evidence to contradict the printed conditions.

Gunnis et al. v. *Erhart.* 1 H. B. 289,
Powell v. *Edmunds.* 12 E. R. 6

6. After proof of the loss of an order of removal, parol evidence may be given of it. *R.* v. *The Inhabitants of Metheringham.* 6 T. R. 556

7. Parol evidence may be admitted to explain a written instrument or agree-

ment which on the face of it appears to be equivocal. 8 T. R. 379

8. No parol evidence can be received to explain an agreement, in which there is no latent ambiguity.

Coker v. *Guy*. 2 B. & P. 565

(See AGREEMENTS I. 11.)

9. Evidence of an usage at the navy office to pay bills indorsed by the attorney in his own name, and negociated by him, under such a power, cannot be received to enlarge the operation of the power.

Hogg v. *Snaith & al.* 1 W. P. T. 347

10. Parol evidence of what passed at the time of effecting a policy of insurance is not admissible to restrain the effect of the policy.

Weston v. *Emes*. 1 W. P. T. 115

VIII. *In Penal Actions.*

1. In an action for non-residence, evidence that the defendant did several acts *as parson*, such as receiving tithes, &c. is sufficient without proving his admission, institution, and induction.

Bevan q. t. v. *Williams, E.* 16 *G.* 3 6 T. R. 535, *n.*

2. So, in an action on the post-horse act against an inn-keeper for penalties incurred, it is not necessary to shew the licence itself of the defendant but as *against him* other evidence is sufficient as that he had written over his door, "licensed to let post horses."

Radford q. t. v. *Briggs*. 3 T. R. 637

3. An averment in a declaration on stat. 11. *G.* 2. *c.* 19. § 3. to recover double the value of goods removed in order to prevent distress, that "57*l.* *was due for rent*" before the goods were removed, need not be precisely proved as laid.

Gwinnet v. *Phillips*. 3 T. R. 643

4. Nor is the *notice of distress*, which alledged a *different* sum to be due material. *ib.*

5. In escape against the sheriff, if the plaintiff aver in his declaration, that *J. S.* was arrested "under a writ indorsed for bail by virtue of an affidavit now on record," he must produce the affidavit in evidence though the latter part of the averment was unnecessary.

Webb v. *Herne & al.* *(Sheriff of Middlesex.)* 1 B. & P. 281

6. In an action on the stat. of usury in discounting a bill, it was proved that one *B.* demanded payment of the acceptor, and commenced an action against him, and afterwards received the amount of the bill, and the costs of those proceedings on producing the bill, and gave a receipt as attorney for the present defendants; this without further evidence of *B.* being the agent of the defendant, and without the production of the proceedings against the acceptor, was held good *primâ facie* evidence to be left to a jury of the defendant, having received the usurious interest.

Owen q. t. v. *Barrow*. N. R. 101

IX. *Presumptive, or Secondary; and of Negative Averments.*

1. *A.* draws a bill of exchange on *B.*, payable to a fictitious payee or order, and indorsed in the name of such payee, which *B.* accepts. In an action by an innocent indorsee for a valuable consideration against *B.*, on the bill, in order to draw an inference, either that *B.*, at the time of his acceptance, knew the name of the payee to be fictitious, or that *B.* had given an authority to *A.* to draw bills on *B.*, payable to fictitious persons, evidence is admissible of irregular and suspicious transactions and circumstances relating to other bills drawn by *A.* on *B.*, payable to fictitious payees, and accepted by *B.*; though none of those transactions or circumstances have any apparent relation to the bill in question; and though none of them prove that *B.* accepted any of those other bills, with a knowledge that the payees mentioned in them were fictitious.

Gibson v. *Hunter*, in *Dom. Proc.* 2 H. B. 288

2. If a person, claiming a toll for passing over an highway, can shew that the liberty of passing over the soil, and the taking of toll for such passage, are both immemorial, and that the soil and the toll were before the time of legal memory in the same hands, though severed since, it will be presumed that the soil was originally granted to the public in consideration of the tolls, and such original grant is a good consideration to support the demand.

Ld Pelham v. *Pickersgill*. 1 T. R. 660

3. In the case of a plain trust, where the trustees were directed to convey to a devisee on his attaining 21, the jury may be directed to presume a conveyance at any time afterwards, though considerably less than 20 years. *England d. Syburn* v. *Slade*. 4 T. R. 682

4. If it be stated that the justices of our lord the king were assigned by letters patent under *his seal of Great Britain*, it will be presumed to be the Great Seal. 4 T. R. 521

5. Nothing is to be presumed after verdict to have been proved but what is expressly stated in the declaration, or what is necessarily implied from those facts which are stated.

Spieres v. *Parker*. 1 T. R. 141

6. Where the issue is on the life or death of a person once existing, the proof lies on the party asserting the death.

Wilson v. *Hodges*. 2 E. R. 312

7. Where the law presumes the affirmative of any fact, the negative of such fact must be proved by the party averring it in pleading. So where any act is required to be done by one, the omission of which would make him guilty of a criminal neglect of duty, the law presumes the affimative, and throws the burthen of proving the negative on the party who insists on it. Therefore where a plaintiff declared that the defendants who had chartered his ship, put on board a dangerous commodity, by which a loss happened) *without due notice* to the captain or any other person employed in the navigation, it lay upon him to prove such negative averment. And it being shewn that the commodity was delivered by the defendants' officer, and received by the first mate of the plaintiff's ship, (which first mate was dead, and no other person was present to deppose to the conversation which passed between them); held that the best evidence of the fact could only be given by the defendants' officer, who delivered the commodity on board to such first mate, and that the action could not be sustained by secondary evidence. *Williams* v. *The E. I. Comp.* 3 E. R. 192

8. Where plaintiff declared on bond *with a profert*, on *non est factum* pleaded, secondary evidence of the bond by means of a copy, and shewing that the defendant had taken away the original, and before action brought said that he had burnt it, is not sufficient to sustain the declaration.

Smith v. *Woodward* 4 E. R. 585

9. If two parts of an instrument are prepared, but one only is stamped, the party having the custody of the unstamped part may give secondary evidence of the contents of the agreement, if the other party refuse, on notice, to produce the stamped part.

Garmons v. *Swift*. 1 W. P. T. 507

10. The Sessions presumed that an indenture of apprenticeship (executed 30 years before, and under which the apprentice had regularly served his time for seven years, when the indenture was given up to him, and proved to be lost, and when the parish in which he was settled under such indenture had relieved him the last 12 years), was *properly stamped* in proportion to the apprentice fee of 12*l.* received by the master; although the deputy registrar and comptroller of the stamp-duties proved that it did not appear in the office that any such indenture had been stamped or enrolled during that period. And the judgment of the justices was confirmed in *B. R.*

R. v. *Long Buckby Inhab.* 7 E. R. 45

11. In ejectment the landlord having proved payment of rent by the defendant, and half a year's notice to quit, cannot be turned round by his witness proving on cross-examination that an agreement *relative to the land in question*, was produced at a former trial between the same parties, and was, on the morning of the then trial, seen in the hands of the plaintiff's attorney, *the contents of which the witness did not know:* no notice having been given by the defendant to produce that paper; for though it might be *an agreement relative to the land*, it might not affect the matter in judgment, nor even have been made between these parties.

Doe d. Wood (Sir M.) v. *Morris*. 12 E. R. 237

12. Offers made by the plaintiff's attorney in the hearing of a third person to do an act relative to the defendant, which lay within the scope of his authority, are not admissible evidence to affect the plaintiff with such offer.

Wilson v. *Turner*. 1 W. P. T. 398

X. *State Papers, &c.*

1. A gazette is evidence of all acts of state. *R.* v. *D. Holt*. 5 T. R. 436

2. And therefore a gazette, in which is was stated that certain addresses had been presented to the king from different bodies of subjects, expressing their loyalty, &c. was admitted in evidence to prove an averment in an information for a libel, "that divers ad-

dresses, &c. had been presented to his Majesty by divers of his loving subjects," &c. 5 T. R. 436

3. The journals of the House of Lords are evidence to prove, not only the address of the lords to the king, but the king's answer also. 5 T. R. 455

4. The articles of war, as printed by the king's printer, are evidence of such articles. *R.* v. *Withers, Nov.* 17, 1784 5 T. R. 442. 446

5. If a licence to trade is lost, the next best evidence is the register of it in the books of the Secretary of State.

Rhind v. *Wilkinson.* 2 W. P. T. 237

6. Where an assured, a British merchant, in an action on a policy of insurance, on goods bound to an enemy's port in Holland, seeks to protect the adventure under the king's licence to trade with the enemy, it is not sufficient to give in evidence at the trial, and to prove his possession in fact before the voyage commenced, of a *general* licence dated three months before, licensing *six neutral vessels* under certain neutral flags, to pass unmolested *to or from any port of* Holland, *from or to any port of this kingdom*, with certain goods (including the goods insured) which licence was directed to *R. S.* and *other* British *merchants* with a condition annexed that they should cause the licence to be delivered up to them or their agents when the ship should enter any port of this kingdom: without also giving probable evidence to account for his possession of the licence, and to shew that his use of it was lawful; as by shewing from whom and when he received it, and then by connecting his own particular adventure with such general licence.

Barlow v. *M'Intosh.* 12 E. R. 311

7. Where a licence to trade with an enemy, granted abroad, had been returned, after being used, to the secretary of the governor by whom it was issued, who had, as he believed, thrown it aside amongst the waste papers of his office, and did not know what was become of it, having afterwards searched for, but not recollecting the finding it, and thinking that he had not found it; this is reasonable and probable evidence of the loss of such licence, so as to let in parol evidence of its contents: the paper not being considered as of any further use at the time; and the witness's attention not having been then called particularly to the circumstances. And the witness may speak to the contents of the licence from memory, though he had made an entry of it in his memorandum book, for the private information of himself and the governor; which book was not produced; for such book, if in court, would not have been evidence *per se;* but could only have been used by the witness to refresh his memory.

Kensington v. *Inglis.* 8 E. R. 273

8. On appeal against a rate made under a private act of parliament, the respondent appearing to answer the appeal, and admitting that he had made the rate by virtue of the act, a printed copy of which was produced in court by the appellants; and the sessions having thereupon decided on the merits of the appeal, notwithstanding an objection of the respondent that the printed copy was not examined by the rolls of parliament: the Court of K. B. refused to quash the order, which was removed thither by *certiorari.* *R.* v. *Shaw.* 12 E. R. 479

EXCISE.

1. A person who intends to become a dealer in foreign wine must take out his licence and enter his warehouse, before he lays in his stock; and a dealer in wine is not entitled to a permit to recover wine sold, which wine was laid in before he took out his licence. *R.* v. *The Commissioners of Excise.* 2 T. R. 381

2. Dealing means buying, in stat. 26 *G.* 3. *c.* 59. *ib.*

3. A person who sells spirituous liquors by retail without a licence from two justices of the peace, is liable to the penalties of stat. 5 *G.* 3. *c.* 46. though he has a licence from the commissioners of the excise to retail spirituous liquors. *R.* v. *Downes* 3 T. R. 560

4. The exception in stat 26 *G.* 2. *c.* 28. that nothing in that act shall extend to alter the *time* of granting licences in *cities* and *towns corporate*, does not exempt such places from the operation of other parts of that act: but magistrates in such districts must give the same notice of their meeting to grant licences as justices for a county give. 3 T. R. 560

5. Whether *Westminster* be a city within stat. 26 *G.* 2. *c.* 28? *Qu.* 3 T. R. 560

6. On 21st *June* the excise-officer granted a permit to the defendant to bring into his cellar 64 gallons of liquor; on the 25th he went to the defendant's cellar where he found a cask containing 76 gallons, for which quantity no permit had been obtained; the defendant being thereon convicted in the penalty of 20*l.* under stat. 9 *G.* 2. *c.* 23. § 7. together with the value of the whole 76 gallons of liquor, held a good conviction.
R. v. *Bass.* 5 T. R. 251

7. A permit for the removing of wine from one place to another under stat. 26 *G.* 3. *c.* 59. dated 9 o'clock in the morning of one day, and giving the party one hour for removing it out of the stock of *A.*, and two days more for delivering it into the stock of *B.*, expires at ten in the morning of the second day after it is granted.
Cooke v. *Sholl.* 5 T. R. 255

8. The information being required to be laid within three months after the offence committed, by 24 *G.* 2. *c.* 40. § 29. referring to prior statutes. (1 *W. & M. c.* 4. § 16. & 12 & 13 *W.* 3. *c.* 11. § 17.) and the information in that case having been laid on the 15th *September*, and the discovery made on the 25th *June*, it is to be presumed that the liquor was then brought in, unless the contrary appear; in which case the information would be exhibited in time. 5 T. R. 251

9. After the duties of excise are charged on wash made for extracting spirits, by stat. 26 *G.* 3. *c.* 73. if any part of the wash is lost by accident, the manufacturer cannot be relieved from the respective proportion of the duty, as for an overcharge.
R. v. *B. Sikes.* 7 T. R. 56

10. No appeal lies to the sessions from a conviction of two justices for an offence under stat. 25 *G.* 3. *c.* 72 § 9. against printing cotton before it is measured, &c. notwithstanding it contains a general clause of reference to all former excise laws, and incorporates all the powers, &c. provided by 12 *Car.* 2. *c.* 24. or by any other law, relating to the excise, or inland duties under the management of the commissioners of excise, for managing, mitigating, or adjudging the duties or penalties granted by this act.
R. v. *The Just. of Surry.* 2 T. R. 540

11. There lies no appeal to the sessions from a conviction by two justices upon the statute 42 *G.* 3. *c.* 38. § 30. for wetting corn in a certain stage of the process of malting; for the clauses of appeal in former excise laws, to which there is a general reference in this act, extend not to convictions for *penalties* by two justices.
R. v. *Shore.* 6 E. R. 514

12. The court will not prevent officers of the revenue from seizing goods in dispute. 2 T. R. 381

13. An excise-officer is entitled to notice under stat. 23 *G.* 3. *c.* 70. § 30. before an action is brought against him for an act not warranted by his official capacity, if done *bona fide* in the supposed execution of his duty; such as the assaulting of an innocent person whom he suspects to be a smuggler employed in running goods.
Daniel v. *Wilson.* 5 T. R. 1
(See tit. ASSUMPSIT VI.)

14. Stat. 9 *G.* 2. *c.* 35. § 26. which enacts that prosecutions for assaults on revenue officers may be tried in any county, only extends to assaults on them *qua* officers; and a defendant having been found guilty on an indictment of a common assault on the prosecutor, who was in fact an excise-officer, this court arrested the judgment, though the prosecutor was described to be an excise officer, the offence being laid in *Surry*, and the venue in *Middlesex*.
R. v. *Cartwright.* 4 T. R. 490

15. The stat. 26 *G.* 3. *c.* 77. § 13. which enacts that no person shall prosecute "any action, bill, plaint, or *information*, in *any* of the *King's courts*," for the recovery of any excise penalty, &c. unless prosecuted by the Attorney General or some revenue officer, is confined to the *superior courts of record*; and therefore an information for a penalty for removing wax candles from the place of manufactory before the duty paid (by § 10 of the same statute) may be prosecuted before the commissioners of excise by one not averred to be such officer.
R. v. *Steventon.* 2 E. R. 362

16. And the information stating in effect that the candles were home made candles seems to be sufficient, without expressly naming them *British* candles the words of the act being "British spirit, soap, and candles:" though supposing this would have been a ground for error or appeal in the original information, it is no objection to

an information in a collateral proceeding for conspiring to prevent the examination of a witness before the commissioners of excise on such prior information, which is only stated by way of recital in the information for the conspiracy. *ib.*

17. The same answer applies to an uncertainty (if any) in the charge of the first information recited; in negativing the excuse of a prior condemnation as well as prior payment of the duty before removal; though that seems proper enough. *ib.*

18. So the issuing of process against the original defendant, or the joining issue on the information recited, is immaterial as to the charging the offence of the subsequent conspiracy. *ib.*

19. Neither is it necessary, at least in such collateral proceeding, to recite that the original information was prosecuted before the commissioners by name, though it be not averred to have been before three or more of them, according to stat. 1 *G.* 2. stat. 2. *c.* 16. *ib.*

20. Neither is it necessary, in reciting such prior information, averred to have been made within three months after the offence committed, according to statute 1 *W. & M. c.* 54. § 13. also to aver notice thereof to the original defendant within a week, as is directed to be given by the same statute. *ibid.*

21. Where the stat. 7 & 8 *W.* 3. *c.* 30. § 24. enables the commissioners of excise, to summon witnesses before them, upon a charge exhibited against another for an offence against the excise laws, and an information in a collateral proceeding recited such summons to have been duly made; proof of a printed summons distributed and issued in blank by order of the commissioners to their agents, and afterwards filled up by one of them without any special directions from the board is sufficient, although not signed by any of the commissioners, nor issued in their individual names: such having been the constant usage in that respect since the introduction of the excise. *ib.*

EXCOMMUNICATION.

1. A writ *de excommunicato capiendo*, stating that the defendant was excommunicated in a cause of "defamation and slander merely spiritual," is good. *R.* v. *Payton.* 7 T. R. 153

2. If the sentence of the greater instead of the lesser excommunication be pronounced, it is only a ground of appeal; this court will not quash a writ *de excommunicato capiendo* for that objection. 7 T. R. 153

3. It is not necessary that the defendant should be resident in the diocese at the time of the excommunication, it is sufficient if he were there at the time of the citation. 7 T. R. 153

EXECUTION.

I. *Priority.*

1. Where two writs of *fieri facias* against the same defendans are delivered to a sheriff on different days, and no sale is actually made of the defendant's goods, the first execution must have the priority, even though the seizure was first made under the subsequent execution.

Hutchinson v. *Johnson.* 1 T. R. 729

2. And if the person claiming under the second execution pay the sheriff, the amount of the debt under the first execution for his security, the court will not compel the sheriff to refund the money on motion. 1 T. R. 729

3. But where the sheriff had given a bill of sale to the person claiming under the second execution, that was held to bind the sheriff.

Rybot v. *Peckham.* 1 T. R. 731, *n.*

4. If *A.* lend money on the security of a ship, and take possession before execution executed at the suit of *B*, the vessel cannot be seized under *B.*'s execution. *Ladbroke* v. *Crickett.* 2 T. R. 649

5. If goods be taken in execution on a *fi. fa.* against the king's debtor, and before they are sold an extent come at the king's suit, grounded on a bond debt tested after the delivery of the *fi. fa.* to the sheriff, these goods cannot be taken upon the extent.

Rorke v. *Dayrell.* 4 T. R. 402

6. The stat 33 *H.* 8. *c.* 39. § 74 does not extend, but abridge, the king's prerogative. 4 T. R. 413, &c.

7. Process sued out by the crown against a defendant to recover penalties, upon which judgment for the crown is afterwards obtained, entitles the king's execution on such judgment to have priority within the statute 33 *Hen.* 8. *c.* 89. § 74 before the execution of a subject, issued on a judgment recovered against the same defendant prior to the king's judg-

ment, but subsequent to the commencement of the king's process: the king's writ of execution having been delivered to the sheriff before the actual sale of the defendant's goods under the plaintiff's execution. *Butler* v. *Butler*, 1 E. R. 338. *Attorney General* v. *Aldersey*, *Mich.* 1786, S. P. *ib.*

8. If the crown and a subject are contending for priority in an execution, the Court will not compel the sheriff to return the writ of *fieri facias* at his own peril of rightly deciding the law, but, upon application, will enlarge the time for the making his return, till the Court of Exchequer shall have decided the point.
Thurston v. *Thurston*. 1 W. P. T. 120

9. If *A.*, being indebted to *B.* and *C.* after being sued to judgment and execution by *B.*, go to *C.* and voluntarily give him a warrant of attorney to confess judgment, on which judgment is immediately entered and execution levied on the same day on which *B.* would have been entitled to execution, and had threatened to sue it out, the preference so given by *A.* to *C.* is not unlawful, nor fraudulent within the meaning of the stat. 13 *Eliz.* c. 5. *Holbird* v. *Anderson*. 5 T. R. 235

10. Though a *levari facias de bonis ecclesiasticis* is a continuing execution, and a levy under it may be made from time to time after it is *returnable*, till the sum indorsed be satisfied, yet if it be *actually returned*, the authority of the bishop is at an end: therefore, where such a writ remained in the hands of the bishop long after it was returnable, who sequestered the profits of a vicarage accruing as well before the return-day, as after; and being ruled to return the writ, returned only the amount of the sum levied up to the *return day*; the court would not for the purpose of securing the plaintiff's priority, order the writ and return to be taken off the file, but would only permit the return to be amended, by inserting the sum levied up to the time when the writ was *actually returned*. *Marsh* v. *Fawcett*. 2 H. B. 582

11. The proper way to have proceeded would have been to have ruled the bishop from time to time, to know what he had levied. 2 H. B. 583

12. Allowing that the award of a writ of sequestration out of chancery (which is the process of that court to compel appearance and the performance of decrees) has the same obligatory effect to bind the goods as a writ of *fi. fa.* at common law; yet if the party at whose prayer such sequestration is issued take no measure to compel the execution of it in due time, and the sequestrators do not in fact possess themselves of the goods, it is no excuse to a sheriff, to whom, at a distance of 18 months, a writ of *fi. fa.* is directed against the goods of the party, defendant in the suit in chancery, for not executing such writ, and selling the goods; the plaintiff, in the sequestation having at all events lost his priority by such laches. And therefore the sheriff, who had seized under the *fi. fa.*, having on notice of such supposed obstacle returned *nulla bona*, was holden liable to the plaintiff in an action for a false return.
Payne v. *Drewe*. 4 E. R. 523

13. Though a writ of *fi. fa.* bind the goods as against the defendant, yet the property is not devested out of him till execution executed: and therefore an execution and sale under a subsequent writ delivered to the sheriff will bind the goods: but the plaintiff in the first execution has his remedy against the sheriff if the non-execution did not proceed from his own laches. *ibid.*

II. *Relation; its Effect by.*

1. A judgment signed in any part of the term, or the subsequent vacation relates back to the first day of the term, notwithstanding the death of the defendant before judgment actually signed; and an execution against the defendant's goods may be taken out upon it, tested the first day of the term. *Bragner* v. *Langmead*. 7 T. R. 20

2. But if the execution be not tested until after the defendant's death, it is irregular. 7 T. R. 24

3. Judgment on a warrant of attorney, entered in *Easter* vacation against a defendant who died in *Easter* term, is good; but a writ of execution, tested after the defendant's death, cannot be sued out upon the judgment till it be revived against the defendant's representative by *scire facias*.
Heapy v. *Parris*. 6 T. R. 368

4. If a *fi. fa.* be tested before defendant's death, but delivered to the sheriff and executed after, the execution is regular.
Waghorne v. *Langmead*. 1 B. & P. 571

8. The statute of frauds only secures the possession of innocent vendees under an execution: but as to the rest of the world, the goods are bound from the delivery of the writ to the sheriff.
Hutchinson v. *Johnson*. 1 T. R. 729
6. A *general judgment*, signed by virtue of a warrant of attorney given before the passing of an insolvent act, of which the defendant is entitled to take advantage by pleading in discharge of his person, &c. will not warrant a *special execution* under the act. But the court will give the plaintiff leave to plead the insolvent act for the defendant, and sign a special judgment under it; for the warrant of attorney will preclude the defendant from saying there is no doubt.
Buxton & al. v. *Mardin*. 1 T. R. 80
7. The defendant having given a warrant of attorney to confess judgment, took the benefit of an insolvent act, then became bankrupt, and obtained his certificate; after which the plaintiff entered up a general judgment, and sued out a general execution: held regular, no dividend appearing to have been made. *Edmonson* v. *Parker*. 3 B. & P. 185
(And see BANKRUPT IV. 12.)
8. A *testatum fi. fa.* was set aside for irregularity, no original *fi. fa.* having issued to warrant it.
Brand v. *Mears*. 2 T. R. 388
9. But such an irregularity may be cured by the subsequent production of a *fieri facias*. *Ib.*; and *Cowperthwaite* v. *Owen*. 3 T. R. 659
(See tit. AMENDMENT II.)
10. A separate *ca. sa.* against one defendant on a joint judgment against two, cannot be supported. 6 T. R. 525
11. If the plaintiff consent to discharge one of several defendants taken on a joint *ca. sa.* he cannot afterwards retake him, or take any of the others.
Clark v. *Clement*. 6 T. R. 525
12. If a plaintiff consent to the defendant's being discharged out of execution on his undertaking to pay at a future day, he cannot afterwards sue out any execution on that judgment in the event of the defendant's not fulfilling his undertaking.
Tanner v. *Hague*. 7 T. R. 420
13. A defendant cannot be taken in execution *twice* on the same judgment though he were discharged the first time by the plaintiff's consent upon an express undertaking that he should be liable to be taken in execution again if he failed to comply with the terms agreed on, which he did.
Blackburn v. *Stupart*. 2 E. R. 243
14. Where a *ca. sa.* is returnable against the principal on a particular day, before which a writ of error is allowed and served, that operates as a *supersedeas* to any proceeding against the bail, though the *ca. sa.* has lain four days in the office before the allowance of the writ of error.
Perry v. *Campbell*. 3 T. R. 390

III. *Levying; Mode and Expenses of.*

1. Nothing but the poundage can be taken by the sheriff under statute 29 *Eliz. c.* 4. for levying an execution.
2 T. R. 148. 157
2. In actions on simple contracts and judgments for a *debt certain*, the expenses of levying must be paid by the plaintiff; so that if the sheriff overcharge, the plaintiff is the party grieved under the statute 29 *Eliz. c.* 4: which limits sheriff's fees: but if the judgment be for a *penalty*, the defendant must pay the expenses of levying, and is the party grieved if the sheriff overcharge.
Woodgate v. *Knatchbull*. 2 T. R. 157
3. Where the defendant suffers judgment by default in an action of debt on simple contract, the plaintiff is not entitled to levy the expenses of the execution; notwithstanding those expenses, together with the debt and costs of the action, do not exceed the sum confessed upon record.
Thornton v. *Merredew*. 3 B. & P. 362
4. Where judgment is signed against a defendant, in an inferior court of record, and he surrenders in discharge of his bail, but before he is charged in execution is removed to the Fleet by *habeas corpus*; the Court (of C.P.) will grant a *certiorari* to remove the record in order to charge him in execution in the Fleet, by virtue of the stat. 19 *G. 3. c.* 70. § 4. *Jordan* v. *Cole*. 1 H. B. 532
5. Goods of a testator in the hands of his executor cannot be seized in execution of a judgment against the executor in his own right.
Farr v. *Newman*. 4 T. R. 621
(But see *Whale* v. *Booth*, cited, 4 T.R. 625: and the opinion of the Court of C. P. 1 B. & P. 295.)
6. Where an executrix used the goods of her testator as her own, and afterwards married, and then treated them as the goods of her husband, the

Court of C. P. held that she could not maintain an action of trover against the sheriff for the goods on their being taken in execution for her husband's debt *Quick & Ux.* v. *Staines.* 1 B. & P. 293

7. Whether the sheriff, who sells a term in possession of the debtor under a *fi. fa.* may not put the vendee in possession? *Qu.*

Taylor v. *Cole.* 3 T. R. 295. 298

8. Where a tenant is in possession, and the execution is against the landlord, whose term is to be sold, the sheriff cannot turn the tenant out of possession. *Semble.* 3 T. R. 298

9. A mere equitable interest in a term of years cannot be taken in execution by the sheriff under a writ of *fi. fa.* at the suit of a judgment creditor.

Scott v. *Scholey & al.* 8 E. R. 467, 2 N. R. 461

10. If a *fi. fa.* issue against one of several partners, the court will not, at the request of the partnership creditors, give the sheriff time to return the writ until an account can be taken of the several claims upon the partnership property.

Parker v. *Pistor.* 3 B. & P. 288

11. A *fi. fa.* having issued against the effects of the defendant, who was jointly concerned in a manufactory with 25 other persons, to whom he was indebted to a greater amount than his whole share, and the sheriff having seized the whole of the partnership property, the court refused to refer it to the prothonotary to inquire what was the defendant's interest in the effects seized.

Chapman v. *Koops.* 3 B. & P. 289

12. Money, the surplus of a former execution against the defendant's goods, was refused to be stayed in the late sheriff's hands for the purpose of satisfying another execution at the suit of the same plaintiff against the same defendant, who had no other effects on which the sheriff in office could levy.

Fieldhouse v. *Croft.* 4 T. R. 510

13. The court of K. B. will not order the sheriff to retain in satisfaction of a present writ of *fi. fa.* issued by the plaintiff against the defendant, *money* or *Bank notes*, which the sheriff had before received for the use of the defendant, in discharge of an execution levied by the defendant against another, and which the sheriff had not paid over.

Knight v. *Criddle.* 9 E. R. 48

14. Defendant having recovered a verdict against the sheriff for seizing his goods under a *distringas* in an action at the suit of *J. S*, and having given a *cognovit* to the plaintiff on which a *fi. fa.* issued, the court refused to order the sheriff to pay over the damages recovered by defendant against him to the plaintiff, in satisfaction of the *fi. fa.* *Willows* v. *Ball.* 2 N. R. 376

IV. *Satisfying or discharging.*

1. The Court of C. P. discharged a defendant out of custody, who was in execution at the suit of a plaintiff some time since deceased, on whose part no will had been proved, nor any administration granted; and whose family, on notice of a motion for the above purpose, declined interfering.

Broughton v. *Martin.* 1 B. & P. 176

2. So the Court of C. P. discharged an attorney in custody by virtue of an attachment for not paying money, under the Lords' act, whose creditor was dead. *R.* v. *Davis.* 1 B. & P. 336

3. The Court of K. B. refused a rule to discharge a defendant out of custody on filing common bail, on the ground, that the plaintiffs, at whose suit he was arrested, were assignees under a commission of bankrupt sued out above three years ago against the defendant, under which they had received dividends.

Oliver v. *Ames.* 8 T. R. 364

4. But the court suspended the execution of the rule on the sheriff to bring in the body; in order to give the defendant time to make an application to the Lord Chancellor for relief.

8 T. R. 364

5. The plaintiff, having charged the defendant in execution, died; the defendant's wife took out administration to the plaintiff; then the court ordered the defendant to be discharged out of custody, saying, that the plaintiff's attorney had no lien on the judgment for his costs.

Pyne v. *Erle.* 8 T. R. 407

6. If one of two defendants taken on a joint *ca. sa.* be discharged under an insolvent debtor's act, that will not operate as a discharge of the other; the discharge of the former not being with the actual consent of the plaintiff.

Nadin v. *Battie & al.* 5 E. R. 147

7. A defendant, superseded for want of being charged in execution within two terms *after* judgment, cannot be again

arrested and taken in execution upon same judgment. Aliter, if superseded for want of proceedings in time *before* judgment. *Line* v. *Lowe*. 7 E. R. 330

8. The Court of K. B. will not stay judgment and execution on a summary application, because the plaintiffs after verdict became alien enemies.
Vanbrynen & al. v. *Wilson*. 9 E. R. 321

EXECUTORS (AND ADMINISTRATORS).

I. *Their general Powers, Rights, &c.*

1. Where a payee of a bill of exchange indorses it to *A.* and *B. as executors*, they may declare as such in an action against the acceptor.
King and other Executors, &c. v. *Thom.*
The Same v. *M'Linnan*. 1 T. R. 487

2. If money belonging to a testator be received by one after the testator's death, his executor may maintain an action for money had and received in his own right.
Smith v. *Barrow*. 2 T. R. 476

3. Where the goods of the testator never were in the possession of the executor, he must, in an action of trover, declare as executor. 4 T. R. 280

4. And whether the conversion happen before or after the testator's death, if the goods when recovered will be assets in the hands of executors, he may sue for them in that character.
4 T. R. 280

5. Where executors pay a sum of money on the testator's account, which they need not have done, and afterwards bring an action to recover it back again, they must declare in their own right, and not as executors.
Munt v. *Stokes*. 4 T. R. 565

6. If executors carry on trade, they must do it as individuals, unless they carry it on under the direction of the Court of Chancery. 1 T. R. 295

7. A power of attorney given by an executrix to act for her *as executrix*, does not authorize the attorney to accept bills to charge her in her own right, though for debts due for her testator.
Gardner v. *Baillie*. 6 T. R. 591
(But see *Howard* v. *Baillie*, 2 H. B. 618. and tit. BILLS OF EXCHANGE I.)

8. In the case of a tenancy from year to year as long as both parties please, if the tenant die intestate, his administrator has the same interest in the land which his intestate had.
Doe d. Shore v. *Porter*. 3 T. R. 13

9. If a debtor make his creditor and an other person executors, and the creditor neither proves the will nor acts as executor, he may maintain an action against the other for his demand on the testator.
Rawlinson v. *Shawe*. 3 T. R. 557

10. Debt does not lie against an administrator upon a simple contract of his intestate.
Barry v. *Robinson*. N. R. 293

11. Where one devises land to five trustees to sell and apply the money to certain uses, and afterwards makes the same persons his executors; they do not take the land as *executors*, but as *devisees in trust* and *joint-tenants*. And at any rate the case is not helped by the statute 21 *H.* 8. *c.* 4. so as to pass the whole estate upon production of a conveyance purporting to be executed by the five, but the execution of which by three only could be proved. But taking it to be a conveyance by the three only, it would sever the joint-tenancy and convey 3-5ths of the estate to be held in common with the two remaining parts.
Denne d. Bowyer v. *Judge*. 11 E. R. 288

II. *Assets; Admission of; and the Effect of the Plea of* Plene administravit *to render Executors personally liable.*

1. A promise by an administrator to pay the debts of the intestate, if there be no assets, is *nudum pactum*. 5 T. R. 6

2. In an action against an administrator, on promises of the intestate, an *insimul computassent* with the administrator *as such*, of money due from the intestate, does not make him personally liable. *Secar* v *Atkinson, Administratrix of Atkinson*. 1 H. B. 102

3. An executor cannot be charged *as such* either for money *had and received* by him, *money lent* to him, or on *an account stated* of money due from him *as such*; those charges making him personally liable. *Rose & Ux.* v. *Bowler & al.* 1 H. B. 108

4. Paying interest on a bond due from testator is not conclusive evidence of assets. *Cleverley* v. *Brett*. 5 T. R. 8, *n.*

5. The question whether assets or not in the executor's hands is settled by the judgment given on a plea of *plene administravit*; and as on that issue no evidence can be given of assets after the writ sued out. *Qu.* whether the ordinary mode of entering up a judgment of assets *quando acciderint* be correct?

for that leaves an interval between the suing out of the writ and the judgment, in which if the executor received any assets, they could not be taken at all. *Mara* v. *Quin.* 6. T. R. 1

6. *Qu.*—Whether the plaintiff may not reply to such a plea that the executor had assets since the suing out of the writ? 6 T. R. 1

7. If an executor plead (to an action on bond) payment, and omit to plead *plene administravit*, and a verdict be given against him on such plea, it operates as an admission of assets in an action founded on that judgment, suggesting a *devastavit*.

Erving v. *Peters.* 3 T. R. 685

8. But if he plead *plene administravit*, he is only liable to the amount of the assets in his hands.

Harrison v. *Beecles, cor.* Ld. *Mansfield, at Guildhall*, 1769. 3T.R.688,*n.*

9. On plea of *plene administravit* proof of an admission by the executor *that the debt was just, and should be paid as soon as he could*, is not evidence to charge him with assets.

Hindsley v. *Russell.* 12 E. R. 232

10. A submission to an award by an administrator is not an admission of assets. *Pearson* v. *Henry.* 5 T. R. 6

11. Where the plaintiff had recovered judgment against a testator in his lifetime, and afterwards had judgment of execution against the executors in *scire facies*, upon which judgment he sued the executors in debt in the *detinet*, suggesting a *devastavit:* held that the executors being fixed conclusively with assets by such latter judgment, the issue, upon *non detinet*, lay upon them to prove the due administration of such assets; otherwise the plaintiff was entitled to recover.

Hope v. *Bague & al.* 3 E. R. 2

12. A declaration against an executor suggesting a *devastavit*, brought in the *detinet* only, is at any rate cured by verdict. But *semble* that independent of the verdict the plaintiff on such a declaration may take judgment *de bonis testatoris.* *ib.*

13. It is not enough for the executor of an executor, sued for breach of covenant made by the original testator, to plead *plene administravit* of all the goods and chattels of the original testator at the time of his death come to the hands of the defendant, &c. without also pleading *plene administravit* by the first executor; or at least that he, the second executor, had no assets of the first; so as to shew that he had no fund out of which any devastavit by the first executor could be made good.

Wells v. *Fydell.* 10 E. R. 315

14. Where the defendant bound himself, *as administrator*, to abide by an award to be made touching matters in dispute between his intestate and another; and the arbitrators awarded that he, *an administrator*, should pay, &c. he cannot plead *plene administravit* to debt on the bond.

Barry v. *Rush.* 1 T. R. 691

15. If an arbitrator under a reference between *A.*, and *B.* administator, award that *B.* shall pay a certain sum as the amount of *A.*'s demand, *B.* cannot afterwards object that he had no assets, but may be attached for non-payment. *Worthington* v. *Barlow, Administratrix.* 7 T. R. 453

16. Though by the statute of frauds an executor is not liable *personally*, without a written promise, yet such written promise does not render him liable, at all events, unless there be an adequate consideration.

Rann v. *Hughes.* 5 T. R. 350

17. An executor having once received assets of his testator, and paid over money to his co-executor for the purpose of satisfying a bond creditor, but who misapplied the money by retaining it to satisfy his own simple contract debt, is liable for such misapplication of his co-executor in an action brought by such bond creditor, and cannot discharge himself from such action by pleading thereto *plene administravit. Crosse & Ux.* v. *Smith & al.* 7 E. R. 246

III. *De son tort.*

1. What acts make a person liable as *executor de son tort* is a question of law: the jury are to say whether the acts be sufficiently proved.

Padget v. *Priest.* 2 T. R. 97

2. The slightest circumstance of intermeddling with the intestate's goods will constitute a man an *executor de son tort.* 2 T. R. 97 & 597

3. Therefore if *A.*, the servant of *B.*, sell the goods of *C.*, an intestate, as well after his death as before, though by the orders of *C.*, and pay the money arising therefrom into the hands of *B.*, *B.* may be sued as an *executor de son tort.* 2 T. R. 597

4. If a person, having intermeddled in the intestate's affairs, has money belonging to him in his hands at the time when an action is brought against him as *executor* for a debt due from the intestate, he is liable as an *executor de son tort*. 2 T. R. 597

5. A creditor of an intestate, who received goods of the intestate after his death from his widow, in payment of the debt, cannot protect his possession against an action of trover by the lawful administrator, upon the ground of such delivery having been made by one who had, by such intermeddling, made herself *executrix de son tort;* no fact appearing to give colour to her having acted in that respect in the character of executrix, except the single act of wrong complained of, in which the defendant participated.

Mountford v. *Gibson*. 4 E. R. 441

6. *Qu.* How far any payment by an *executor de son tort* to a creditor can be set up as a bar to an action of trover by the lawful executor, &c.; though if it be such as the latter would have been bound to make, it shall be recouped in damages. *ib.*

7. If a creditor take an absolute bill of sale of the goods of his debtor, but agree to leave them in his possession for a limited time, and in the mean time the debtor die, whereupon the creditor takes and sells the goods, he will be liable to be sued as *executor de son tort* for the debts of the deceased; for the debtor's continuing in possession is inconsistent with the deed, and fraudulent against creditors

Edwards v. *Harben*. 2 T. R. 587

8. An *executor de son tort* cannot discharge himself from an action brought by a creditor, by delivering over the effects to the rightful executor *after the action is brought*. *Curtis* v. *Vernon*, 3 T. R. 587. Affirmed in *Cam. Scac.* *Vernon* v. *Curtis*. 2 H. B. 18

9. Nor can he retain for his own debt of an higher nature by consent of the rightful executor, given *after* the bringing of the action by the creditor. 3 T. R. 587

10. Nor can he plead that such delivery over and retainer were after action brought, but before plea pleaded; though, in fact, no administration was granted until after the action was brought. 2 H. B. 18

IV. *Preference in Payment of Debts.*

1. A debt on a judgment against a testator or intestate, not docketed according to the directions of stat. 4 & 5, *W.* & *M.* c. 20, is put by that act on a level with simple contract debts.

Hickey v. *Hayter, Administratrix*. 6 T. R. 384

2. Therefore such judgment not docketted, cannot be pleaded by an executor or administor to an action on a simple contract. *Steele* v. *Rorke, Administratrix*. 1 B. & P. 307

3. And on a plea of *plene administravit* to debt on such a judgment, the defendant may give in evidence payment of specialty debts which exhausted all the assets. 6 T. R. 384

4. Debt on bond against an administrator, to which he pleaded a bond debt due to himself and retainer; held that it was not necessary to aver in the plea that such bond was given to himself for a just and true debt, nor to set out the letters of administration: for the plaintiff by his declaration admits him to be a lawful administrator.

Picard v. *Brown*. 6 T. R. 550

5. A plea of judgment recovered on a simple contract, pleaded by an administrator to debt on a bond, must aver that such recovery was had before notice of the bond debt.

Sawyer v. *Mercer*. 1 T. R. 690

6. To assumpsit against an executrix she pleaded that the testator became bound to *A.* in 2800*l.* conditioned (among other things) to indemnify him against another bond for 800*l.* which *A.* had executed jointly with the testator to *B.*, but for the proper debt of the testator: that the 800*l.* became due in the testator's life, and was still unpaid; that upon the testator's death the indemnity bond became forfeited, and the money therein contained was still unpaid; and that the defendant had administered all (except so much as would satisfy the indemnity bond); this was held a good plea.

Cox v. *Joseph*. 5 T. R. 307

7. In the above case the plaintiff might have taken issue on the allegation in the plea that the original bond for 800*l.* became due and payable in the lifetime of the testator. 5 T. R. 309

V. *Probate; or Letters of Administration; when necessary; and their Effect.*

1. An executor's right is derived from the will; the probate is only evidence of it: therefore he has a constructive possession from the testator's death.
Smith & al. Assignees of Clarke v. *Milles.* 1 T. R. 480
2. A probate, as long as it remains unrepealed, cannot be impeached in the temporal courts.
Allen v. *Dundas.* 3 T. R. 125
3. Payment of a debt to an executor, who has obtained a probate of a forged will, is a discharge to the debtor of the intestate, notwithstanding the probate be afterwards declared null, and administration be granted to the intestate's next of kin. 3 T. R. 125
4. The only way of proving a right to personal property under a will is by the probate. *R.* v. *The Inhabitants of Netherseal,* 4 T. R. 258
5. The administratrix of an executor cannot sue for the double value of lands held over, after notice to quit under a demise from the testator contrary to 4 *G.* 2. *c.* 8. without taking out administration *de bonis non:* even though the tenant has attorned to her.
Tingrey v. *Brown.* 1 B. & P. 310
6. The authority of an administrator appointed according to the provisions of 38 *G.* 3. *c.* 87. during the absence of an executor from this country, does not become actually void upon the death of such executor, but only voidable. *Taynton* v. *Hannay.* 3 B. & P. 26

F.

FEIGNED ISSUE.

Trying a feigned issue without the consent of the court is a contempt of the court; and after such a trial they will stay the proceedings. 4 T. R. 402

FELONY.

I. *By Statutes.*

1. Persons receiving any goods, &c. belonging to a vessel in the *Thames,* knowing the same to have been stolen, may be prosecuted for felony under stat. 2 *G.* 3. *c.* 28.
R. v. *Wyer.* 2 T. R. 77
2. Setting fire to a *parcel* of unthreshed wheat is not felony within stat. 9 *G.* 1. *c.* 22. 2 T. R. 255
(And see tit. HUNDRED.)
3. The defendant who had been committed for having "with force and arms made an assault upon the prosecutor with intent feloniously to steal, take and carry away from the person," &c. was bailed, because he was not charged with any offence within the statute 7 *G.* 2. *c.* 22. which enacts "that if any person shall make an assault with an offensive weapon, or by menaces, or in a forcible manner, demand money, &c. from any other person, with a felonious intent to rob such person, he shall be guilty of felony." *R.* v. *Remnant.* 5 T. R. 169
4. It is not felony within 8 & 9 *W.* 3. *c.* 26. § 6. to put off, &c. diminished money, not cut in pieces, at a lower rate than its legal value, if it be not stated to have been *unlawfully* diminished.
Tooke v. *Hollingworth & al. (Assignees).* 5 T. R. 217

II. *Restitution of Goods.*

1. The owner of goods stolen prosecuting the felon to conviction, cannot recover the value of them in trover from the person who purchased them in market-overt, and sold them again before conviction, notwithstanding the owner gave him notice of the robbery while they were in his possession.
Horwood v. *Smith.* 2 T. R. 750
2. For, in order to maintain trover, the plaintiff must prove that the goods were his property, and that *while they were so* they came into the defendant's possession, who converted them to his use. 2 T. R. 756
3. But he has a right to restitution of the goods in specie. 2 T. R. 755
4. And perhaps would be entitled to recover damages in trover against any person who is fixed with the goods after conviction, and refuses to deliver them. 2 T. R. 755
(And see 5 T. R. 175. tit. TROVER.)

FERRY.

An exclusive right to a ferry from *A.* to *B.* does not prevent persons going by any other boat from *A.* directly to *C.*, though it lie near to *B.*, provided it be not done fraudulently, and as a pretence for avoiding the regular ferry.

Tripp v. *Frank.* 4 T. R. 666

FINE OF LANDS.

1. A fine levied by a copyholder, who continues in possession, is void as against the lord.

Roe v. *Hellier.* 3 T. R. 162

2. When once the five years allowed to an infant to make an entry for the purpose of avoiding a fine begin, the time continues to run notwithstanding any subsequent disability. *Doe d. Count Duroure* v. *Jones.* 4 T. R. 300

3. Neither will subsequent insanity stop the running of a fine once commenced. *Doe d. Griggs* v. *Shane, M.* 28 *G.* 3 *B. R.* 4 T. R. 306, *n.*

4. *A.*, seised in fee of lands, dies leaving *B.* his heir a femme covert. Upon his death a stranger makes a tortious entry on the lands, continues in possession, and levies a *fine sur cognizance de droit come ceo*, with proclamations; *B.* afterwards *dies under coverture*, no entry having been made on her behalf to avoid the fine, leaving *C.* her heir of the age of twenty-one, of sound mind, out of prison, and within the realm. The fine is a bar to the right of *C.*, unless he make his claim within five years after the death of *B.*

Dillon v. *Leman.* 2 H. B. 584

5. Every fine at the time of signing the judge's allocatur thereon shall have the writ of covenant sued out and annexed thereto. *Reg. Gen. C. P. T.* 30 *G.* 3. 1 H. B. 526, 7

6. No fine, which appears to have been acknowledged more than 12 months, can pass the King's Silver office, without a rule of court or judge's order. In such case, if the conusors be living, an affidavit must be made thereof. If dead, the affidavit must state the time of their death. And the application for a rule or order, that the fine may pass the King's Silver office, shall be made, on motion, to the court, if in term time, if in vacation, to a Judge at chambers; and the rule or order must be filled with the *præcipe* and concord at the King's Silver-office.

Reg. Gen. C. P. E. 36 *G.* 3. 1 B. & P. 530

7. If under a *dedimus potestatem* to take the acknowledgment of nine persons to a fine, the commissioners take the acknowledgment of six on one piece of parchment, and of three on another, the court will not allow the fine to pass.

Balch v. *Phelps.* 3 B. & P. 366

8. The affidavit of acknowledgment of a fine made by one of the commissioners, in *France*, but not signed, appearing to be in the same hand-writing as his signature to the acknowledgment at the foot of the *præcipe*, and concord, and indorsement on the writ; and such affidavit having been taken and attested in *France* by two *English* magistrates on account of an exorbitant demand of per centage on the part of the *French* officer authorized to take affidavits; the Court of C. P. allowed the fine to pass.

Lovibond v. *Morshead, Bart. & Ux.* 2 N. R. 57

9. The notarial certificate required in the case of a fine acknowledged in a foreign country, must be under *seal;* a defect in this particular cannot be supplied by proof of the hand-writing of the cognizors.

Cruttenden v. *Bourbell.* 1 W. P. T. 144

10. The Court of C. P. will not permit a fine to be levied in which it appears that the conusor is an alien enemy.

1 W. P. T. 144

11. When the estate of a married woman has been regularly sold with the consent of her husband, the conveyance, executed by him, and the purchase-money paid, the Court of C. P. will not prevent the wife from levying a fine, because her husband has since become *non compos.*

Stead v. *Izard.* N. R. 312

12. But the Court refused to interfere to authenticate a fine levied by a married woman in the absence of her husband, though he had become a bankrupt, and omitted to surrender himself, and was gone beyond seas.

Ex parte Abney. 1 W. P. T. 37

13. Where a fine was levied of *Michaelmas* term, relating to the 6th of *November*, though in fact levied on the 8th; it is sufficient evidence of the seisin in fact of the cognizor at the time of the fine levied, that a writ of possession after a recovery in ejectment was executed on his behalf, on the evening of the 6th, by the officer's entry on the land and claiming it for the cognizor, but without any actual

change of the tenant in possession, who afterwards paid rent to the cognizor. And so it seems the receipt by a lawful possessor of rent due after a fine levied, for a period antecedent to such fine, is *primâ facie* evidence, if no covin appear, of his possession during the period for which the rent is received.

Doe d. Osborn v. *Spencer.* 11 E.R.495

14. Tenant for life having levied a fine, and afterwards devised the premises and died seised; the entry and continuing possession of the devisee (the defendant in ejectment) is no disseisin of the reversioner; disscessin importing an ouster of the rightful tenant from the possession and an usurpation of the freehold tenure. And therefore no question could arise whether, considering the devisee of the reversion as a disseisor a fine *sur cognizance de droit come ceo* levied by her, before entry, to a stranger without any declaration of uses would bar her right of entry by estoppel and fortify the estate of the disseisor, or whether it would simply enure to her own use or be altogether inoperative.

William d. Hughes & Ux. v. *Thomas.* 12 E. R. 141

15. The fine of a tenant for life devests the estate of the remainder-man or reversioner, leaving in him only a right of entry, to be exercised either then, by reason of the forfeiture, or within five years after the natural determination of the preceding estate. And the effect of the stat. 4 *H.* 7. *c.* 24. is only to save to all the remainder-men their respective rights of entry within five years after their respective titles accrue, without a subsequent remainder-man being prejudiced by the laches of another remainder-man who preceded him.

Goodright v. *Forrester.* 8 E. R. 552

16. The effect of a fine by tenant for life of parcel of a manor, the reversion of which parcel was in the tenant in fee in possession of the other parts of the manor, is to sever such parcel from the manor. 8 E. R. 552

17. If a fine be levied by a tenant for life which turns the estate of the reversioner to a right of entry, and the reversioner devises it without entering; if the devise be of any effect, the devisee must enter within the same time, within which the devisor, if living, or his heir, must have entered.

Goodright d. Burton v. *Forrester in Error.* 1 W. P. T. 578

18. *A.*, tenant for life, with remainder to his own executors for 40 years, with the reversion to *B.* in fee, levied a fine with proclamations. After the fine, *B.* without entering, devised to *C.* for life, with remainder to *D.* in tail, and died, living *A.* *A.* died. *C.* did not enter within five years after the expiration of the term of 40 years. *D.* is barred, and cannot enter within five years after the death of *C.*

1 W. P. T. 578

19. He who will take benefit of the second saving in the stat. 4 *H.* 7. must, 1. Be other than a party or privy to the fine. 2. The right must first come to him. 3. It must first come after the fine and proclamation. 4. It must come by matter before the fine.

1 W. P. T. 578

20. A fine *sur concessit* may be levied when the intention is to pass several mesne particular estates and a reversion in fee. *Ludlow & Ux. Conuzors; Drummond & al. Conuzees.* 2 W. P. T. 84

21. A fine must certainly express what estate it purports to grant: therefore the Court of C P. will not permit a fine *sur concessit* to be levied of a dubious estate under the words of a description of "all and whatsoever the said —— hath in the tenements." Nor will the Court permit two operations, as that of a fine *sur concessit*, and one *sur connusance de droit*, to be combined in the same fine.

Seymour v. *Barker & Ux.* 2 W.P.T.198

FISHERY.

1. There may be a prescriptive right in a subject to a several fishery in an arm of the sea. *Mayor, &c. of Orford* v. *Richardson.* 4 T. R. 439

(See PLEADING XII. 2, 3.)

2. *Prima facie* every subject has a right to take fish found upon the sea-shore between high and low water-mark.

Bagott v. *Orr.* 2 B. & P. 472

3. But such general right may be abridged by the existence of an exclusive right in some individual. *ib.*

4. *Qu.* If there be a *prima facie* right in every subject to take fish shells found on the sea-shore between high and low water-mark? *ib.*

5. Where one has a right under ancient deeds to have a wear across a river for taking fish, when such wear had theretofore been made of brushwood through which fish could escape, he cannot convert it into a *stone* wear, whereby the fish are prevented from escaping.
Weld v. *Hornby (Clk.)* 7 E.R. 195
6. And an acquiescence in such alteration for 20 years, will not bind the party from seeking his remedy after that period, where the public are interested in the right. 7 E. R. 195
7. By the custom of the whale fishery among the *Gallipagos* islands, he who strikes a whale with a loose harpoon is entitled to receive half the produce from him who kills it.
Fennings v. *Ld. Grenville.* 1 W.P.T. 241
8. But unless he who strikes a fish continues his dominion until he has reduced it into possession, any other person who kills it acquires the entire property. 1 W.P.T. 241 243, *n.*

FOREIGN ATTACHMENT.

1. A sum of money directed to be paid by *A.* to *B.* by the master's *allocatur*, cannot be attached in *A.*'s hands by process out of the sheriff's court in an action against *B.*
Coppell v. *Smith.* 4 T.R. 312
2. Neither can money awarded under a rule of court be attached.
Grant v. *Harding*, *H.* 7. *G.* 3. *B.R.* 4 T. R. 313, *n.*
3. A garnishee, against whom a recovery was had in the mayor's court on foreign attachment, after a summons to the defendant and nihil returned, may protect himself by giving such proceedings in evidence upon non-assumpsit in an action to recover the same debt brought by the defendant below, without proving the debt of the plaintiff below who attached the money in his hands: although by the course of proceedings in the mayor's court, bail not having been put in, the plaintiff below was not obliged to prove the debt to entitle himself to recover against the garnishee.
M'Daniel v. *Hughes.* 2 E. R. 367

FOREIGN LAWS.

1. *A.* and *B.* being inhabitants of the United States of *America*, while those states were colonies of *Great Britain* and before the war broke out between the two countries, *B.* executes a bond to *A.* During the war, but *after the declaration of independence* by the Congress, both parties were attainted, their property confiscated and vested in the respective states of which they were inhabitants, by the legislative acts of those states, and a *fund provided for the payment of the debts of* B. *in America.* *A.* may maintain an action on the bond against *B.* in *England.*
Folliott v. *Ogden.* 1 H. B. 123
2. The several acts of attainder and confiscation being considered as passed by *sovereign independent states.*
Wright v. *Nutt & al.* 1 H. B. 149
3. It is not a good plea in bar of the action at law, that an ample fund was provided out of the effects of *B.* in *America*, for the payment of his debts, to which *A. might* and *ought* to have resorted, and out of which he might have *been* paid. 1 H. B. 149
4. But that is a good ground for relief *in equity.* 1 H. B. 149
5. Accordingly an *injunction* was granted by the Court of Chancery, to prevent execution being taken out on a judgment obtained in an action at law, on a promissory note, the circumstances of which resembled those of the case of *Folliott* v. *Ogden*; see *Wright* v. *Nutt & al. in Canc. H.* 28 *G.* 3. 1 H. B. 136, *n.*
6. But see *Wright* v. *Simpson, in Canc.* 1802, where a bill to have bonds delivered up, or to compel the creditor to resort, in the first instance, to the fund arising from the confiscation, *was dismissed* by Lord *Eldon* C., on the ground that it did not appear that the creditor had the clear means of making his demand effectual against that fund: Lord Chancellor also expressing an opinion in favour of the right to sue personally was in that case against the authority of *Wright* v. *Nutt*, *above* 6 *Ves. jun.* 714
7. The penal laws of foreign countries are strictly local, and effect nothing more than they can reach, and can be seized by virtue of their authority.
Folliott v. *Ogden.* 1 H. B. 123
8. The judgment in the case of *Folliott* v. *Ogden*, was affirmed by the Court of King's Bench, on a writ of error, *T.* 30 *G.* 3., but on grounds different from those on which the Court of Common Pleas proceeded.—The Court of K. B. holding that the acts of confiscation passed in several states of *North America*, after the declaration of independence and before the treaty of peace, by

which this country acknowledged their independence were to be considered as a nullity in the courts of law in this country. *Ogden* v. *Folliott*, 3 T. R. 726: and see *Dudley* v. *Folliott*, 3 T.R. 584: and *Parl. Cases*, 8vo. 4. 111.

9. A natural-born subject of *Great Britain* may be also a citizen of a foreign country (*America* for example) for the purposes of commerce, and entitled to all the advantages of an *American*, under a treaty with that country: the circumstance of his coming over to *Great Britain* for a temporary purpose, does not deprive him of those advantages.

Wilson v. *Marryat*. 8 T. R. 31 (Affirmed in *Cam. Scac.* 1 B. & P. 430.)

10. As to the effect of judgments in foreign courts, upon property of *British* subjects within their jurisdiction, and how far such judgments shall be allowed to interfere with the laws of this country, see the opinion of *Eyre*, C. J. of C. P. 2 H. B. 409, &c.

FORESTALLING.

1. Declaration stated that *H. S.* being possessed of land, on which hops were growing, agreed to sell to *F. W.* all the hops then growing on the said land at 10*l. per cwt.* to be paid by *F. W.* to *H. S.*, to be delivered in pockets by the said *H. S.* to *F. W.* at *Whitstable* in *Kent*; that in consideration that *F. W.* undertook to accept and pay for the hops, *H. S.* promised to deliver them at the place and manner aforesaid in a reasonable time next after they should be picked and gathered; that the hops were picked and gathered, and amounted to 2 *cwt.* and although a reasonable time for delivery had elapsed, and although said *F. W.* was during that time and afterwards ready and willing to accept and pay for the hops at the rate and in manner, &c. yet *H. S.* had not delivered them. The Court of C. P. held, that the sale of hops growing on the land was not illegal, it not being averred that they were bought to sell again. *Bristow & al.* v. *Wuddington & al. in Error*, 2 N.R. 355

FORFEITURE.

1. If a ship be seized as forfeited under the navigation act, (12 *Car.* 2. *c.* 18.) by a governor of a foreign country belonging to *Great Britain*, the owner cannot maintain trespass against the party seizing, although the latter do not proceed to condemnation; for by the forfeiture the property is devested out of the owner.

Wilkins v. *Despard*. 5 T. R. 112

2. A record of condemnation of goods in the Exchequer, for being smuggled, is a good defence to an action for goods sold and delivered for the same goods, although it did not appear that the plaintiff had any notice of the proceedings in the Exchequer.

Thomas v. *Whithers, Sitt. at Guildh. C. B.* 16 *G.* 3. *cor. Gould* J. 5 T.R. 117, *n.*

3. So it is a good defence if the goods be afterwards seized as having been smuggled, though no condemnation proved. *Hennel* v. *Perry, Sitt. after M.* 1 *G.* 3. *at Westm. coram Lord Mansfield.* 5 T. R. 117, *n.*

4. *A.* being entitled to a life estate subject to a condition not to charge or encumber it, granted an annuity, and demised the land as a security: but there being a defect in the memorial of the annuity, it was held that the deed was wholly void, and did not work a forfeiture of the estate.

Denn d. Dolman v. *Dolman*. 5 T.R. 641

5. In an action against a wharfinger to whom goods were sent to be shipped, for neglecting to take out a sufferance, for want of which the goods were seized, it is not necessary to aver or prove that the goods were condemned by a sentence *in rem*.

Baker v. *Liscoe*. 7 T. R. 171

6. In such a case it is sufficient to aver, that "for want of such sufferance the said goods were *seized as forfeited*, whereby the same became wholly lost to the plaintiff;" and proof of a seizure in fact by the officer for a just cause of forfeiture will sustain the declaration. 7 T. R. 171

FRAUDS, STATUTE OF:

1. No person can, by the statute of frauds, be charged upon any promise to pay the debt of another, unless the agreement upon which the action is brought, or some note or memorandum thereof, be in writing; by which word *agreement* must be understood the *consideration* for the promise, as well as the *promise* itself. And therefore where one promised in writing to pay the debt of a third person, without stating on what consideration, it was holden that *parol* evidence of the consideration was inadmissible by the statute of frauds;

and consequently such promise appearing to be without consideration upon the face of the written engagement, it was *nudum pactum*, and gave no cause of action.

Wain v. *Walters*. 5 E. R. 10

2. The statute is supposed to have been drawn by Lord *Hale*. *ib*. 17

3. A guaranty in writing to pay for any goods which the vender delivers a third person is good, within the 4th sect. of the statute of frauds, as containing a sufficient description of the *consideration* of the promise, (namely, the delivery of the goods when made) as of the *promise* itself; both of which are included in the word *agreement*, required by that section to be reduced into writing, &c.

Stadt v. *Lill*. 9 E. R. 348

4. A memorandum, signed by the defendants, whereby they agreed to give so much for goods, takes the case out of the 17th sect. of the statute of frauds, though not signed by the seller, nor expressing any consideration for the defendant's promise, otherwise than by inference from their own obligation. *Egerton* v. *Matthews*. 6 E. R. 307

5. But a note signed by the seller only, and not expressing the name of the buyer, is not sufficient.

Champion & al. v. *Plummer*. N. R. 252

6. A bill of parcels, in which the vendor's name is printed, delivered to the vendee at the time of an order given for the future delivery of goods, seems to be a sufficient memorandum of a contract within the statute of frauds.

Saunderson v. *Jackson*. 2 B. & P. 238

7. At all events a subsequent letter, written and signed by the vendor, referring to the order, may be connected with the bill of parcels so as to take the case out of the statute. *ib*.

8. The statute of frauds will prevent a parol agreement to buy goods, without either earnest or delivery, from giving the buyer any property in them. In such case, therefore, the buyer cannot maintain *trover* against the vendor who sells them to another person.

Alexander v. *Comber*. 1 H. B. 20

9. It was in this case, said by Mr. *J. Wilson*, that where a sale is not immediate, as in case of a contract to purchase a carriage when built, it is not within the statute. 1 H. B. 20

10. But in a subsequent case where *A*. and *B*. had entered into a verbal agreement for the sale of goods to be delivered to *A*. at a future period, (there being no earnest paid, nor any note in writing, nor delivery of any part of the goods), *Lord Loughborough* and *Gould* and *Heath*, Justices, held this contract to be void within the statute, though it had been admitted by *B*. in his answer to a bill in chancery, filed for the performance of it; at the same time pleading the statute.

Rondeau v. *Wyatt*. 2 H. B. 63

[Mr. *J. Wilson*, (absent as a commissioner in chancery), expressed his adherence to his former opinion.]

11. If it appear to have been the understanding of the parties to a contract, that it was not to be *completed* within a year, though it might be and was in fact *in part performed* within that time, it is within the 4th clause of the statute of frauds; and if not in writing signed by the party to be charged, &c., it cannot be enforced against him. And his signature in a book intitled "*Shakespeare* subscribers, their signatures," not referring to a printed prospectus which contained the terms of the contract, and which was delivered at the time to the subscribers to the *Boydell Shakespeare*, cannot be connected together, so as to take the case out of the statute, as such connexion could only be established by parol evidence.

Boydell v. *Drummond*. 11 E. R. 142

12. A sale of goods for more than 10*l*. by sample at one place, to be afterwards delivered at another, is within the statute of frauds, if no part of the goods contracted for were delivered, nor any thing given by the buyer to bind the bargain, nor any memorandum thereof in writing.

Cooper v. *Elston*. 7 T. R. 14

13. Where goods are ponderous and incapable of being handed over by actual delivery, it may be done by that which is tantamount, as by delivering the key of a warehouse in which they are. Therefore, after a bargain and sale of a stack of hay between the parties on the spot, evidence that the vendee actually sold part of it to another person, by whom, though against the vendee's approbation, it was taken away, is sufficient to warrant the jury in finding a delivery to and acceptance by the vendee: thereby taking the case out of the statute of frauds.

Chaplin v. *Rogers*, 1 E. R. 192

14. If a man bargains for the purchase of two horses, and desires the vendor to keep them in his possession at livery for an especial purpose for the vendee, and the vendor accepts the order, and in consequence thereof removes the horses out of the sale stable into another stable, this is a sufficient delivery of the horses within the statute of frauds. *Elmore* v. *Stone*. 1 W.P.T. 458

15. *A.* having sent to *B.* a bale of sponge (under a verbal order from the latter), for which he charged 11*s.* *per* pound; *B.* returned it, and at the same time wrote a letter to *A.* stating that he had examined the sponge and finding that it was not worth more than 6*s.* *per* pound, he had sent it back. Held that this letter did not amount to such an acceptance of the goods as would take the case out of the statute of frauds.

Kent v. *Huskinson*. 3 B. & P. 233

16. A parol promise to pay the debt of another, and also to do some other thing, is void by the statute of frauds.

Chater v. *Beckett*. 7 T. R. 201

17. *A.* being insolvent, a verbal agreement was entered into between several of his creditors and *B.*, whereby *B.* agreed to pay the creditors 10*s.* in the pound, in satisfaction of their debts; which they agreed to accept, and to assign their debts to *B.*: held that this agreement was not within the statute, not being a collateral promise to pay the debt of another, but an original contract to purchase the debts.

Anstey v. *Marden*. N. R. 124

18. The plaintiff, a broker, having a lien on certain policies of insurance effected for his principal, for whom he had given his acceptances; the defendant promised that he would provide for the payment of those acceptances as they became due, upon the plaintiff's giving up to him such policies in order that he might collect for the principal the money due thereon from the underwriters; which was accordingly done, and the money was afterwards received by the defendant: held that this was not a promise for the debt or default of another within the statute of frauds; and that the plaintiff might recover against the defendant as well for the breach of agreement in not providing for the payment of the acceptances, as also upon a count for money had and received, &c.

Castling v. *Aubert*. 2 E. R. 325

19. A sale of lands, though by auction, is within the statute of frauds.

Walker v. *Constable*. 1 B. & P. 306

20. Where one was alleged to have bought an estate for another, which he had articled for in his own name, but there was no written agreement between them, nor any part of the purchase-money paid by the plaintiff, parol evidence that the estate was purchased for the plaintiff was refused, and equity refused to compel a conveyance. *Bartlett* v. *Pickersgill*, *T.* 32 and 33 *G.* 2. *in Chancery*, cited in *R.* v. *Boston*. 4 E. R. 577

21. A contract with the owner of a close for the purchase of a growing crop of grass there, for the purpose of being mown and made into hay by the vendee, was held to be *a contract or sale of an interest in or concerning land*, and voidable by the 4th section of the statute of frauds, if not reduced to writing, and may be discharged by parol notice from the owner before any part execution of it.

Crosby v. *Wadsworth*. 6 E. R. 602

22. The first section of the statute of frauds, as construed by the 2d, is meant to vacate parol leases, &c. conveying a greater interest in land than for three years, and whereon a rent is referred. *ib.*

23. A contract by the owner of a close cropped with potatoes, made on the 21st of *November*, to sell to the defendant the potatoes at so much a sack; the defendant, to get them out of the ground *immediately;* was held *not* to be a contract for any *interest in land* within that section; but the same as if the potatoes, which had done growing and were to be taken up immediately, had been sold in a warehouse, from whence they were to be removed by the defendant.

Parker v. *Staniland*. 11 E. R. 362

24. A sale of growing turnips, no time being stipulated for their removal, and the degree of their maturity not being positively found; was held to be a sale of an interest in land.

Emmerson v. *Heelis*. 2 W. P. T. 38

25. A will to direct the uses of a surrender of a copyhold or of a customary estate, passing by surrender, is not within the statute of frauds, and need not be signed unless such signature be required by the terms of the surrender to the uses of the will. *Doe d. Cook & Ux.* v. *Danvers*. 7 E. R. 298

26. A tenant having agreed with his landlord, that if he would accept another tenant he would pay 40*l.* out of 100*l.* good will, and having received the 100*l.* is liable in an action for money had and received, the consideration being executed and the case thus taken out of the statute of frands as a contract for an interest in land.

Griffith v. *Young.* 12 E. R. 513

G.

GAME AND GAME LAWS.

1. On a question of the qualification of a defendant for killing game, the convicting magistrates may ground their opinion of his not being qualified, on the fact of the defendant's having, on a former day, sworn (under the income act) to an estate under 100*l.* a year.

R. v. *Clarke.* 8 T. R. 220

2. An estate, the rents of which are reduced under 100*l.* a year, by paying the interest of a mortgage, gives no qualification for killing game.

Wetherill v. *Hall, B. R. M.* 23 *G.* 3. 8 T. R. 221, *n.*

3. An estate of the value of 150*l. per ann.* holden by the defendant in his own right, under a lease for 99 years to trustees, if the defendant and others should so long live, is a sufficient qualification to kill game, under the stat. 22 & 23 *Car.* 2. *c.* 25. 2. 3.

Ferrers (Earl) v. *Henton.* 8 T.R.506

4. A diploma conferring the degree of doctor of physic, granted by either of the universities in *Scotland*, does not give a qualification to kill game under stat. 22 & 23 *C.* 2. *c.* 25.

Jones v. *Smart.* 1 T. R. 44

5. Neither is a doctor of physic of the *English* universities qualified as such. 1 T. R. 53

6. An *esquire*, or *other person* of higher degree as such, is not qualified to kill game under that statute; but the *son* of an esquire, or the *son* of *other person* of higher degree is. 1 T.R. 44

7. A commission of captain of volunteers, signed by the Lord Lieutenant of a county, does not confer the degree of an esquire; and, therefore, the eldest son of such captain is not qualified to kill game.

Talbot v. *Eagle.* 1 W. P. T. 510

8. A conviction of the defendant on that statute, as "not being the eldest son of an esquire, or of other person of higher degree," is good. *King* v. *Utley*, 24 *G.* 3. *cited in Jones* v. *Smart.* 1 T. R. 45, 8, 51

9. Questions respecting the boundaries of a manor cannot be tried in an action on the game laws. *Calcraft* v. *Gibbs*, 4 T. R. 681; and *Hankins* v. *Bailey*; and *Blunt* v. *Grimes, there cited.*

10. It is no defence to debt for penalties on the game laws that the defendant acted *bonâ fide* as game-keeper of the manor in which the offence was committed, under a deputation from a person claiming a right to appoint the game-keeper, there being no ground for the claim.

Calcraft v. *Gibbs.* 5 T. R. 19

11. The possession of game by a servant employed to detect poachers, who took it up after it had been killed by strangers on the manor, in order to carry it to the lord, is not *a possession* within the penalty of the game laws. *Warneford* v. *Kendall.* 10E.R.19

12. In debt for a penalty, under the game laws, if the defendant shew a deputation as game keeper of the manor from the lord, it may be presumed, if nothing appear to the contrary, that the game killed by him there was for the use of the lord under the stat. 3 *G.* 1. *c.* 11.

Spurrier v. *Vale.* 10 E. R. 413

13. It is no objection to an information on the game laws that it is not *qui tam.*

R. v. *W. Lovet.* 7 T. R. 152

14. On an information on the game laws, charging the defendant with keeping and using a dog and also a gun on the same day, he can only be convicted in one penalty. 7 T. R. 152

15. If the evidence be given on the same day that the defendant appeared and pleaded, it will be intended that the evidence was given in his presence. 7 T. R. 152

(And see CONVICTION I.)

16. A magistrate should state all the evidence in the conviction, and not merely the result of it.

7 T. R. 152—8 T. R. 222

17. *Semble*, that a declaration for a penalty on killing game brought for the whole penalty on the statute 2 *G.* 3, *c.* 19, § 5. and prior statutes, need not allege the fact to have been committed within two terms before the action commenced, according to stat. 26 *G.* 2, *c.* 2., the stat 2 *G.* 3. having allowed six months. 2 E. R. 333

GAMING.

1. The statute 27 *G.* 3. *c.* 1, which takes away the summary jurisdiction of magistrates over offences concerning the lottery, only extends to *State lotteries*; and does not repeal their power over games of chance or lotteries prohibited by stat. 12 *G.* 2. *c.* 28.

R. v. *J. Liston.* 5 T. R. 338

2. What evidence is sufficient to support a charge for keeping a gaming-table. 5 T. R. 338

3. Insuring in the lottery is not gaming within stat. 5 G. 2. *c.* 30. § 12. which will prevent a bankrupt's certificate being allowed.

Lewis v. *Piercy.* 1 H. B. 29

4. Where by the terms of a horse race the *entrance money* is to be given to the *second best horse*, and it is doubtful on the wording of those terms, whether *all* the money paid at the entering each horse, is to be considered as entrance money, the court will put such a construction on the terms, as will conclude the *whole* in the description of *entrance money to be given to the second best horse*, being most agreeable to stat. 13 *G.* 2. *c.* 19. § 2 & 7.

Dowson v. *Scriven.* 1 H. B. 218

5. If the jury, on an indictment on the stat. 9 *Ann.* c. 14., find that the assault was on account of money won at play, the case is within the statute, though the assault were committed at a subsequent time and place, and after abusive language between the parties in respect of such money won.

R. v. *Hill Darley.* 4 E. R. 174

6. Statute 9 *Ann.* c. 14. which avoids all securities for goods or money lent at unlawful games, and gives the loser a power to recover back the same, within three months, does not make the contract void, but voidable only; and, therefore, the loser cannot recover them after three months, though the winner can shew no title to them except what arises from having won them at play.

Vaughan v. *Whitcomb.* 2 N. R. 413

7. Whether or not the particular schemes denounced by the stat. 6 *G.* 1. *c.* 18. § 18. as manifestly tending to the common grievance, prejudice, and inconvenience of great numbers of subjects in their trade and other affairs, be in themselves unlawful and prohibited, without reference to the fact of such tendency in a particular instance in the opinion of a court and jury; such as the raising great sums by subscription for trading purposes, and making the shares in the joint stock transferrable; at any rate the inviting of such subscriptions by holding out false and illegal conditions, such as that the subscribers would not be liable beyond the amount of their respective shares, seems to be an offence within the act. But as the statute had not been acted upon for a great length of time, and was now sought to be enforced by a private relater, who seemed not to have been deluded by the project, but to have subscribed with a view to an application to the Court of K. B., that court refused to interfere, by granting an information, though they discharged the rule without costs.

R. v. *Dodd.* 9 E. R. 516

GAOL AND GAOLER.

(And see HABEAS CORPUS 13. 14.)

1. The lord of a franchise is not, as such, bound to repair a gaol within it; but he may be subject to such a charge by immemorial usage.

R. v. *The Earl of Exeter.* 6 T. R. 373

2. A gaoler is bound to receive a prisoner *tendered* to him *after the return day* of the writ on which he is arrested.

Brandling v. *Kent.* 1 T. R. 60

3. *Qu.*—Whether a gaoler would be answerable for receiving a prisoner tendered to him, where the arrest was illegal on the face of the warrant; like the case of a pound-keeper? T. R. 62

4. The Court of C. P. refused to refer a matter concerning the Warden of the Fleet to the Prothonotary for examination. *Johnson* v. *Smith.* 1 H. B. 105

5. The Warden of the Fleet cannot demand an additional fee for expedition, in returning a writ of *habeas corpus.* 1 H. B. 105

6. All the prisons in the kingdom are the King's prisons. The House of Correction for the County of Middlesex, built by virtue of stat. 26 *G.* 3.

c. 55, and adapted to the separate reception of felons pursuant to stat. 22 G. 3. c. 64, and other acts, is a legal prison for the safe custody of persons under a charge of high treason. *Ex parte Evans.* 8 T. R. 172

7. The hulks and penitentiary houses are appointed by particular statutes for particular descriptions of convicts. 8 T. R. 172

GLEANING.

After two solemn arguments, it was held by the Court of C. P. that a right to glean in the harvest field cannot be claimed by any person at common law; neither have the *poor* of a parish legally settled, such right within the parish. *Steel* v. *Houghton & Ux.* 1 H. B. 51:—*Worlledge* v. *Manning, E.* 26 G. 3. 1 H. B. 53, *n.*

H.

HABEAS CORPUS.

1. If an apprentice of above the age of eighteen, having been impressed, afterwards voluntarily enter into the king's service, his *master* is not entitled to sue out an *habeas corpus* to bring him up to be discharged. *R.* v. *Reynolds.* 6 T. R. 497

2. So where the apprentice is protected from being impressed by the statute 13 G. 2. c. 17. but is willing to enter into the king's service. *Ex parte Lansdown.* 5 E. R. 58

3. So where the apprentice has entered into the king's service, but is as anxious to return as the master is to have him. *R.* v. *Edwards.* 7 T. R. 745

4. And it seems that without reference to the desire of the apprentice to stay or to return, the court will not grant the *habeas corpus* on the application of the *master*, for the object of that writ is the personal liberty of the party. See the above cases.

5. Where application had been made for the discharge of an impressed seaman before the two years of his protection by the stat. 13 *Geo.* 2. c. 17. were expired: which was then ineffectual, because the facts were not verified with sufficient certainty; yet the doubt being now removed by another affidavit, the Court granted a writ of *habeas corpus* for the purpose of liberating him, though the two years were expired. *Bruce ex parte.* 8 E. R. 27

6. Where, upon a *habeas corpus* to bring up the body of an apprentice, the keeper of the House of Correction returned, with the body of the party, a regular conviction of him by two magistrates on the stat. 20 *Geo.* 2. c. 19. for a misdemeanor in absenting himself as an apprentice from his master's service; it is no answer to shew by affidavit that the party had bound himself *when an infant* to serve till twenty-five, and that when he came of age he elected to avoid the indentures, after which the offence imputed had been committed; for this was proper matter to be shewn to the magistrates below, who, if the matter shewn to them were true, acted at their own peril in committing the party; but the Court of K. B. have no power to discharge an apprentice from his indentures; and are bound, by the return of a regular conviction, where the objection does not appear on the face of the return, to remand the party. *Ex parte Gill.* 7 E. R. 376

7. The House of Lords having voted the defendant guilty of a breach of privilege, in publishing a libel upon a member of their house, and having sentenced him to pay a fine of 100*l.* and to be imprisoned six months, and until such fine was paid, which commitment was returned into the Court of K. B. upon a *habeas corpus* sued out by the defendant; that court refused to discharge him out of custody. *R.* v. *Flower.* 8 E. R. 314

8. Return to an *habeas corpus*, "I had not at the time of receiving this writ, nor have I since had the body of *A. B. detained* in my custody, so that *I could not* have her, *&c.*" was held a bad return, and an attachment granted against the party who made it. *R.* v. *Winton.* 5 T. R. 89

9. It seems a sufficient return to a *habeas corpus*, that the defendant is in custody under the sentence of a court of competent jurisdiction to inquire of the offence, and to pass such a sen-

tence, without setting forth the particular circumstances necessary to warrant such a sentence.

R. v. *Suddis.* 1 E. R. 306

(And see 1 E. R. 306. tit. SOLDIER.)

10. A *habeas corpus ad testificandum* issued to bring up a prisoner to give evidence before an election committee of the House of Commons, on affidavit of service of a rule to shew cause on the different persons concerned, and no cause shewn. *In the Matter of Sir Edward Price, a Prisoner.* 4 E. R. 587

11. The father of a child is entitled to the custody of it, though an infant at the breast of its mother, if the court see no ground to impute any motive to the father injurious to the health or liberty of such a child, as by sending it out of the kingdom; the father being at the time an alien enemy domiciled in this kingdom, and the mother being an *Englishwoman*, and apprehensive only that he meant to send the child abroad, but assigning no sufficient reason for such her apprehension.

R. v. *d. Manneville.* 5 E. R. 221

12. The Court of K. B. will grant a *habeas corpus* to bring up the body of a bastard child, within the age of nurture, for the purpose of restoring it to the custody of the mother, from whose quiet possession it was taken, at one time by fraud, and afterwards by force; and this without prejudice to the question of guardianship, which belongs to the Lord Chancellor representing the king in Chancery.

R. v. *Hopkins & Ux.* 7 E. R. 579

13. Service of a demand of a copy of the commitment on the turnkey of a prison is not sufficient to support an action against the gaoler for the penalty incurred by him under the *habeas corpus* act, for not delivering the copy to the prisoner within due time after demand made, if the gaoler himself were in the prison.

Huntley v. *Luscombe.* 2 B. & P. 530

14. *Qu.* Whether a commitment in execution for a penalty on conviction before a magistrate for an offence against the excise laws be a commitment for "a criminal matter," within the provisions of the *habeas corpus* act, so as to entitle a prisoner to an action against the gaoler for not delivering a copy of the commitment within a certain time after demand made? *ib.*

15. The Court of C. B. will not grant a *habeas corpus* to bring up a prisoner in custody upon a criminal matter, in order to have him charged with a declaration in a civil action.

Walsh v. *Davies.* 2 N. R. 245

16. The Court of K. B. on affidavit suggesting probable cause to believe that a helpless and ignorant female foreigner was exhibited for money against her consent, granted a rule on her keepers to shew cause why a writ of *habeas corpus* should not issue to bring her before the court; and directed an examination before the coroner and attorney of the court in the presence of the parties applying and applied against. *Case of the Hottentot Venus.* 13 E. R. 195

HIGHWAYS.

1. The parish at large are *primâ facie* bound to repair all highways lying within it, unless by prescription they can throw the *onus* on particular persons by reason of their tenure. *R.* v. *The Inhabitants of Sheffield.* 2 T. R. 106

2. A presentment of a road under stat. 13 *G.* 3. *c.* 78. § 24. against a smaller district than a parish must state expressly *how* they are liable.

R. v. *The Inhabitants of the Hamlet of Penderryn.* 2 T. R. 513

3. If it do not, the judgment may be arrested. 2 T. R. 513

4. If a parish be situate, part in one county and the rest in another, and a highway lying in one part be out of repair, an indictment against the inhabitants of *that part only* is bad. *R.* v. *The Inhabitants of Clifton.* 5 T. R. 498

5. In such case the indictment must be against the whole parish. 5 T. R. 498

6. To an indictment against the inhabitants of a parish for non-repair of a highway within it, a plea, stating that the parish was immemorially divided into seven townships, the inhabitants of which respectively were immemorially bound to repair the highways within their respective townships; and that *part* of the highway indicted was within the township of *G. B.* &c. and that the residue, &c. was within the township of *L. B.* &c.; and that the respective parts ought to be repaired by the inhabitants of the respective townships, &c., is bad; without specifying *what part* of the highway lay within one township, and what part within the other.

R. v. *Bridekirk (Inhab.)* 11 E. R. 304

7. The commissioners appointed by stat. 6 *G.* 3. *c.* 78. (an act for dividing and inclosing certain lands in the parish of *C.*) which enacts, that the public roads to be set out by them should be repaired in such manner as other public roads are by law to be repaired, and that the private roads should be repaired by such *person or persons* as they should award, have no power to impose on the parish at large the burden of repairing any of the private roads set out in pursuance of the act.

R. v. *The Inhabitants of Cottingham* 6 T. R. 20

8. If the inhabitants of a township, bound by prescription to repair the roads within the township, be expressly exempted by the provisions of a road act from the charge of repairing new roads to be made within the township, that charge must necessarily fall on the rest of the parish. 2 T. R. 106

9. If trustees, under a road act turn a road through an inclosure, and make the fences at their own expense, and repair them for several years, they cannot be compelled to continue such repairs, unless there be a special proprovision in the act to that effect.

R. v. *The Commissioners of the Llandillo District*, &c. 2 T. R. 232

10. What is meant by a road is the surface over which the subjects have a right to pass, and not the fences on each side. 2 T. R. 232

11. The owners of the land are bound to repair the fences on each side, unless otherwite provided by the act. 3 T. R. 232

12. An indictment against the parish of *B.* for not repairing a road leading from *A.* to *B.*, is exclusive of *B.*, and therefore bad; and it is not aided by a subsequent allegation that *a certain part of the same highway situate in B.* is in decay, *&c.*

R. v. *Gamlingay (Inhab.)* 3 T. R. 513

13. Indictment for non-repair of a highway within certain limits, charging the corporation of *Liverpool* with a prescriptive liability to repair all common highways, &c. within such limits, "excepting such as ought to be repaired according to the form of the several statutes in such case made," is bad, for want of shewing that the highway in question was not within any of the exceptions. *R.* v. *The Mayor, &c. of Liverpool.* 3 E. R. 86

14. A count stating the defendant's lisbility to arise by virtue of an agreement with the owners of houses alongside of the highway, is also bad; for the parish who are *primâ facie* bound to the repair of all highways within their boundaries cannot be discharged from such liability by any agreement with others. *ib.*

15. It is sufficient in pleading a public highway to allege that it is a common public highway, without shewing *how* it became so, or that it has been such *time immemorial.*

Aspindall v. *Brown.* 3 T. R. 265

16. In pleading a public highway, it is not necessary to state *any termini.* 1 H. B. 351

17. In trespass, a plea of justification, stating that the public highway led from another highway (leading from *A.* to *B.*) *in, through, over, and along,* the *locus in quo,* to a certain other highway (leading from *C.* to D.), was held by the Court of C. P. (*dissent Loughborough*, C. J.) to be well supported by evidence, proving that the way in question led from the *terminus a quo. viz.* the way leading from *A.* to *B.* over the *locus in quo,* to a different way called *E.*, and *along that way* into the way leading from *C.* to *D.*, the *terminus ad quem.*

Rouse v. *Bardin & al.* 1 H. B. 351

18. Under a turnpike act the trustees had power to turn roads through private grounds, making satisfaction to the owners; and if they could not agree, they were enabled, on giving notice to the owners, to summon a jury to ascertain the damage, and to order such sum so ascertained, to be paid to the owners: an inquisition of the jury and an order of the trustees under the above act were quashed, because it did not appear on the face of the proceedings that *any notice* had been given to the owners of the land.

R. v. *Bagshaw.* 7 T. R. 363

19. The magistrates are not bound to appoint surveyors of the highways from the list of persons returned to them under stat. 13 *G.* 3. *c.* 78. if in their opinions the persons named in the list are not qualified: but they may appoint other persons of the parish who are qualified.

R. v. *Baldwin.* 7 T. R. 169

20. If the magistrates, upon proper lists returned to them, omit to appoint a surveyor of the highways at their first

special sessions after the Michaelmas quarter sessions as directed by the stat. 13 *G.* 3. *c.* 78. § 1. they are bound to make such appointment at a subsequent special sessions.

R. v. *Justices of Derbyshire.* 4E.R.142

21. Under the stat. 13 *G.* 3. *c.* 84. § 33. *B. R.* may apportion the fine for non-repair of a road between the parish and the trustees of a turnpike, though the indictment were originally preferred at the assizes, and afterwards removed thither by *certiorari*. *R.* v. *Upper Papworth (Inhab.)* 2E.R.413

22. An inclosure act having directed that the allotments made by the commissioners should for ever remain for the benefit of the appointees: held that an award and assignment of the *herbage* of a certain close to the surveyors of the highways and *their successors*, for the benefit of the parish of *B.*, though bad as a common law conveyance, the appointees not being a corporation, was yet good as a parliamentary declaration of the persons entitled to take the same, as if the terms of the award had been specifically enacted. And the lord of the manor, in whom the fee of the soil remained, is a trustee for the surveyors of the highways for the time being.

Johnson v. *Hodgson.* 8 E. R. 38

23. Under the 19th sect. of the general highway act 13 *G.* 3. *c.* 78. a new highway must be set out before an old one can be stopped up; and it is not sufficient that another old highway was widened in parts to answer the purpose of a new road. And if a new highway be not set out before the old one be stopped up, the legality of the order of the justices for diverting the old road and stopping it up, may be questioned in an act on of trespass, notwithstanding such orders were confirmed by the Sessions on appeal, stating the fact of a new road being set out in lieu of the old one.

Welsh v. *Nash.* 8 E. R. 394

24. The plaintiff having brought *replevin* for goods levied under a warrant of distress for an assessment made by a special sessions under the highway act, 13 *G.* 3. *c.* 78. § 47. on the ground of the premises for which he was assessed, being situated without the township which was liable to repair the road; the Court of C. P. refused to set aside the proceedings.

Fenton v. *Boyle & al.* 2 N. R. 399

HOLIDAYS.

1. The 29th of *May* is not a holiday in any of the law offices, and consequently no officer can take an extraordinary fee for business done on that day.

Pater v. *Croome.* 7 T. R. 336

2. The only allowed holidays are *Candlemas*, the *Ascension*, and *St. John the Baptist.* 7 T. R. 336

HUNDRED.

1. *Qu.*—Whether, before the statute of hue and cry, the party robbed could have had an action against the hundred to recover damages for not keeping watch and ward? *Jackson* v. *Calesworth (Inhab.)* 1 T. R. 72

2. In an action against the hundred on the stat. 9 *G.* 1. *c.* 22. for damage sustained by the wilful burning of the party's barn, it is a precedent condition that the party grieved should within the time limited, give in his examination upon oath before a magistrate, whether or not he *knew* the offender or offenders, or *any of them:* and an examination on oath, in which the party only swore that he *suspected* that the fact was done by *some person or persons to him unknown*, is not sufficient within the statute; still less in support of an averment in the declaration, that he gave in such examination, &c. *in and by which it appeared* that the plaintiff did *not know* the person or persons who committed the fact. For *non constat* by the terms of such examination that the plaintiff did not know some of the offenders if there were several. *Thurtell* v. *Hundred of Mutford and Lothingland.* 3 E.R.400

3. The burning of a *mill-house*, not parcel of any dwelling-house, is not felony within the stat. 9 *G.* 1. *c.* 22. which gives a remedy to the party grieved against the hundred, though within the stat. 9 *G.* 3. which omits the remedial clause *Hiles* v. *Hundred of Shrewsbury.* 3 E. R. 457

4. An action of debt for 100*l.* lies upon the stat. 19 *G.* 2. *c.* 34. § 6. against the inhabitants of a lath in Kent by the executor of a revenue officer, who being in a boat between high and low water mark in pursuit of a smuggling boat in which were offenders against the act, received a mortal wound from a shot fired *by a person on the shore within the lath*, though the officer afterwards *died* on the high sea, beyond the low

water mark, and consequently *out of the lath;* and the act gives the remedy against the inhabitants of the lath, &c. where the offence shall be committed, *i. e.* where the officer, endeavouring to apprehend the offender, shall be killed. *Grosvenor, Ex. &c.* v. *St. Augustine's Lathe (Kent.)* 12E.R.244

I. AND J.

JEOFAILS.

1. If a local action be brought and tried in a wrong county, the defect is aided after verdict by 16 & 17 *Car.* 2. *c.* 8. *The Mayor, &c. of London* v. *Cole.* 7 T. R. 583
2. Statute of jeofails will not assist on a writ of error from an inferior court, where one of two counts in a declaration is not laid within the jurisdiction, and the damages are general. *Trevor* v. *Wall.* 1 T. R. 151
3. Where in debt on bond by an administrator the declaration alleged that administration was granted by the Bishop of *Litchfield* and *Coventry*, and the venue in the margin was laid in *London*, but the bond was stated to be made at *Derby*, which is within the diocese, the Court on a general demurrer held that to be sufficient, and that the bad venue in the margin was cured by the statute of jeofails. 3 T. R. 387
4. In an action on statute 34 *G.* 3. *c.* 23. for pirating a pattern for printing callico, the omission of an averment in the declaration, "that the day of first publishing the pattern was printed at each end of the piece of callico," (which, together with the name of the proprietor, is required by that statute, the monopoly being limited for three months from the day of first publishing the pattern), was holden to be aided by verdict; it being stated in the declaration that the defendants pirated the pattern *within the term of three months from the day of the first publishing thereof, and while the plaintiffs were entitled to have the sole right of printing the same,* &c. *Macmurdo* v. *Smith.* 7 T. R. 518

IMPRESSING SEAMEN.

1. In debt on stat. 19 *G.* 2. *c.* 30. for the penalty of 50*l.* for impressing a mariner in the *West India* trade, the declaration must aver that he had not deserted from *any* of his majesty's ships of war. 1 T. R. 141
2. A seafaring man, serving the office of headborough, is not thereby exempted from being impressed. *Ex parte Fox.* 5 T. R. 276
3. The stat. 6 & 7 *W.* 3. *c.* 18. § 19. which allows to the master of every ship, engaged in the coal trade, two seamen free from being impressed, was said by the court to be still in force. *Ex parte Dryden.* 5 T. R. 416
4. But in a subsequent case the court determined that this section and others of the act were merely temporary, and are no longer in force. *Ex parte Gallite.* 7 T. R. 673
5. And it was held that if the master nominate those seamen before the ship sailed, and they were afterwards impressed, the Court of K. B. would grant a *habeas corpus* to the officer impressing them, to bring them up that they might be discharged. 5 T. R. 416
6. *Secùs*, if the men were not nominated until after they were impressed. *Ex parte Atkinson.* 5 T. R. 419, *n.*
7. A keelman, employed in navigating down the river *Tyne* to the port of *Shields*, at the mouth of that river, is liable to be impressed, and cannot afterwards bring himself within the protection of the 13 *G.* 2. *c.* 17. § 2. exempting every person, not having before used the sea, who shall bind himself apprentice to serve at sea, from being impressed for three years from such binding. *Ex parte Softly.* 1E. R. 466

INDICTMENT.

I. *Indictable Offences; what are.*

1. Taking up dead bodies, even though for the purpose of dissection, is an indictable offence. *R.* v. *Lynn.* 2 T. R. 733
2. It is not an indictable offence to exercise a trade in a borough, contrary to the bye-laws of that borough. *R.* v. *J. Sharpless.* 4 T. R. 777
3. The voluntary absence of a chief officer of a corporation upon the charter-day of election of his successor is not indictable upon the stat. 11 *G.* 1. *c.* 4.

§ 6, unless his presence as such chief officer be *necessary* by the constitution of the corporation to constitute a legal corporate assembly for such purpose. *R.* v. *Corry.* 5 E. R. 372

4. Where a statute forbids the doing of a thing, the doing it wilfully is indictable, although without any corrupt motive. 4 T. R. 457

5. Where a new offence is created by an act, and a penalty annexed to it by a separate and substantive clause, it is not necessary for the prosecutor to sue for the penalty, but he may indict on the prior clause as for a misdemeanor. *R.* v. *Harris.* 4 T. R. 202

6. If the commissioners, under an inclosure act, set out a *private road* for the use of the inhabitants of nine parishes, directing the inhabitants of six of those parishes to keep it in repair, no indictment can be supported against the latter for not repairing it, *it not concerning the public.* *R.* v. *Richards & al.* 8 T. R. 634

7. An indictment for a forcible entry may be maintained at common law, though the statutes give other remedies to the party grieved; provided that the indictment charge the defendants with having used such force as constitutes a public breach of the peace. *R.* v. *Wilson & al.* 8 T. R. 357

8. If such indictment charge the defendants with having *unlawfully and with a strong hand*, entered the prosecutor's mill, and expelled him from the possession, it is good. 8 T. R. 357

9. The stat. 26 *G.* 2. *c.* 6. § 1. enacts that all persons going on board ships coming from insected places shall obey such orders as the king in council shall make without annexing any particular punishment; the disobedience of such an order is an indictable offence, and punishable as a misdemeanor at common law. 4 T. R. 202
Qu. Whether the penalties in § 5. attach on any other than the captain, seamen, and passengers? *ib*

10. If one kill another in a deliberate duel, under provocation of charges against his character and conduct however grievous, it is murder in him and in his second; and therefore the bare incitement to fight, though under such provocation, it is in itself a very high misdemeanor, though no consequence sue thereon against the peace. *R.* v. *Rice.* 3 E. R. 581

11. An endeavour to provoke another to commit the misdemeanor of sending a challenge to fight, is itself a misdemeanor indictable, particularly where such provocation was given by a writing containing libellous matter, and alleged in the prefatory part of the indictment to have been done with intent to do the party bodily harm, and to break the king's peace: the sending such writing being an act done towards procuring the commission of the misdemeanor meant to be accomplished. *R.* v. *Phillips.* 6 E. R. 464
(And see *post* III. 35.)

12. Where two sets of magistrates have a concurrent jurisdiction, and one appoints a meeting to grant ale licences, their jurisdiction attaches so as to exclude the other appointing a subsequent meeting: though they may all meet together the first day: and if, after such appointment, the other set of magistrates meet on a subsequent day and grant other licences, their proceeding is illegal and the subject of an indictment. *R.* v. *Sainsbury.* 4 T. R. 451

13. Where a duty is thrown on a body consisting of several persons, each is individually liable for a breach of duty, as well for acts of commission as of omission. 5 T. R. 607

14. A mere false assertion, unaccompanied by a recommendation, is not indictable. 6 T. R. 565

15. The following were declared to be offences at common law, and not done away by the repeal of the statute 5 & 6 *Ed.* 6. *c.* 14.

16. Spreading rumours with intent to enhance the price of hops, in the hearing of hop-planters, dealers, and others, that the stock of hops was nearly exhausted, and that there would be a scarcity of hop, &c. with intent to induce them not to bring their hops to market for sale for a long time, and thereby greatly to enhance the price. *R.* v. *Waddington.* 1 E. R. 143

17. Spreading such rumours generally, with intent to enhance the price of hops. *ib.*

18. Endeavouring to enhance the price by persuading divert dealers, &c. not to take their hops to market, and to abstain from selling for a long time. *ib.* 144

19. Engrossing large quantities of hops, by buying from many particular persons by name, certain quantities, with intent to re-sell the same for an unreasonable profit, and thereby to enhance the price. *ib.*

20. *Ad idem*, stating the particular contracts. *ib.*

21. Getting into his hands large quantities, by contracting with various persons for the purchase, with intent to prevent the same being brought to market, and to re-sell at an unreasonable profit, and thereby greatly to enhance the price. *ib.*

22. Buying large quantities with like intent, *ib.* 145 & 168

23. Buying large quantities with intent to re-sell at exhorbitant profit, &c. *ib.* 145 & 168

24. Unlawfully engrossing, by buying large quantities with like intent. *ib.*

25. Engrossing hops of divers persons by name, with an intent to re-sell at an unreasonable profit, and thereby enhance the price.
R. v. *Waddington.* 1 E.R. 167

26. Engrossing hops, then growing, by forehand bargains, with like intent. *ib.*

27. Buying all the growth of hops in several parishes by forehand bargains, with like intent. *ib.* 168

28. Buying all the growth of hops on certain lands in certain parishes, by forehand bargains, with intent to sell at an unreasonable price, and to enhance the price. *ib.*

29. Engrossing, by buying large quantities of persons unknown, with intent to re-sell at an exorbitant price, &c. *ib.* 169

30. Buying hops, then growing, with intent to re-sell at an exorbitant price and lucre. *ib.*

32. To forestall any commodity which is become a common victual and necessary of life, or used as an ingredient in the making or preservation of any victual, though not formerly used or considered as such, is an offence at common law. *ib.*

32. Indictment lies against one who was clerk to the agent for French prisoners of war, for taking bribes in order to procure the exchange of some of them out of turn. *R.* v. *Beale, E.* 38 *G.* 3, (cited). 1 E. R. 183

33. It seems that persons putting on board a ship an unknown article of a combustible and dangerous nature, without giving due notice of its contents, so as to enable the master to use proper precautions in the stowing of it, is guilty of a misdemeanor. *Williams* v. *The East India Comp.* 3 E. R. 201 (And see 3 E. R. 192. EVIDENCE IX.)

34. Threatening by letter, or otherwise to put in motion a prosecution by a public officer, to recover penalties for selling Fryar's Balsam, without a stamp (which by stat. 42 *G.* 3. *c.* 36. is prohibited to be vended without a stamped label), for the purpose of obtaining money to stay the prosecution, is not such a threat as a firm and prudent man may not be expected to resist, and therefore is not in itself an indictable offence at common law, although it be alledged that the money was obtained; no reference being made to any statute which prohibits such attempt.
R. v. *Southerton.* 6 E. R. 126

35. But it seems that such an offence is indictable upon the stat. 18 *Eliz. c.* 5, § 4. for regulating common informers, which prohibits the taking of money, without consent of court, under colour of process, or without process, from any person, upon pretence of any offence against a penal law. *ib.*

36. But no indictment for any attempt to commit such a statutable misdemeanor can be sustained as a misdemeanor at common law, without at least bringing the offence intended, within, and laying it to be against the statute. *ib.*

37. Though if the party so threatened had been alleged to be guilty of the offence imputed, within the statute, imposing the duty, and creating the penalty, such an attempt to compound and stifle a public prosecution for the sake of private lucre in fraud of the revenue, and against the policy of the statute, which gives the penalty as auxiliary to the revenue and in furtherance of public justice, for example sake might also, upon general principles, have been deemed a sufficient ground to sustain the indictment at common law. *ib.*

38. Public officers may be indicted for enabling accountants with the pay-office to pass false accounts in fraud of the revenue.
R. v. *Bembridge & al.* 6 E. R. 136

39. Indictment for a burglary, laid in the 1st count to have been committed in the house of *M. R. B.*, in the 2d. of *J. B.*, and in the 3d. of *W. N.* It appeared that the place where the robbery was committed was the centre of a building, having two wings; that in the centre building the business of *M. R. B.*, *J. B.*, *W. N.* and several other

persons was carried on; that in part of one of the wings was the dwelling of *M. R. B.*, and in the other part that of *J. B.*, neither having any internal communication with the centre, except by a window in the dwelling of *J. B.*, which looked into a passage that ran the whole length of the centre, and that the other wing was occupied by *W. N.* from which there was no communication with the centre. *Semb.* That the robbery did not amount in law to a burglary.

R. v. *John Egginton.* 2 B. & P. 508

40. If a servant, being solicited to become an accomplice in robbing his master's house, inform his master thereof, who thereupon tells him to carry on the business, and consents to his opening a door leading to the premises, and being with the robbers during the robbery, and also marks his property, and lays it in a place where the robbers are expected to come, this conduct of the master will not amount to a defence in an indictment against the robbers. *ib.*

41. Any person making or knowingly using a false affidavit taken abroad (though a perjury could not be assigned on it here) in order to mislead our own courts, and to pervert public justice, is punishable by indictment as for a misdemeanor.

Onealy v. *Newell.* 8 E. R. 364

II. *False Pretences, &c. of Indictments for.*

1. An indictment charging the defendant with obtaining money by *false pretences* is insufficient, if it do not shew what the false pretences were; and such a defect is a sufficient ground for reversing a judgment against the defendant. *R.* v. *Mason.* 2 T. R. 581

2. To constitute an offence within stat. 30 *G.* 2. *c.* 24. money or goods must be obtained by the defendant by a *false pretence with intent to defraud:* and it is no objection that the pretence consists in a representation, as of some transaction to take place at a *future* time. *J. Young* v. *The King (in error).* 3 T. R. 98

3. Where the pretence is conveyed by words spoken by one defendant in the presence of others who are acting in concert together, they may be all indicted *jointly.* 3 T. R. 98

4. An indictment at common law, charging that the defendant, deceitfully intending by crafty means and devices to obtain possession of certain lottery tickets the property of *A.*, pretended that he wanted to purchase them for a valuable consideration, and delivered to *A.* a fictitious order, &c. purporting to be a draft on a banker for the amount, which he knew he had no authority to draw, and that it would not be paid, by virtue of which he obtained possession of the tickets and defrauded the prosecutor of the value, cannot be maintained, inasmuch as it does not charge the defendant with having used any false token to accomplish the deceit.

R. v. *B. Lara.* 6 T. R. 565

5. In an indictment on the stat. 30 *G.* 2. *c.* 24. for obtaining money on false pretences, it is sufficient to allege that the defendant unlawfully, knowingly, and designedly pretended so and so; by means of which *said false* pretences he obtained the money; afterwards negativing such pretences to be true: though it be not in terms alleged that he *falsely* pretended, &c. and it seems it would have been sufficient to allege that he obtained the money by such and such pretences, averring such pretences to be false.

R. v. *Airey.* 2 E. R. 30

6. Persons appointed by the commissioners, though in an informal manner, collectors of the property-tax under 43 *G.* 3. *c.* 122. cannot be convicted on an indictment charging them with the receipt of duties by *colour and pretence of being collectors* of duties under that act, though the monies were fraudulently collected and misapplied; for they were in fact appointed collectors, and in such character they received the money. *R.* v. *Dobson & al.* 7 E. R. 218

7. But they ought to have been indicted under § 19 of the act. *ib.*

III. *Form of Indictments; and of taking Advantage thereof on Demurrer,* &c.

1. Every indictment must contain a complete description of such facts and circumstances as constitute the crime, without inconsistency or repugnancy. But, except in certain cases, where technical expressions, having grown by long use into law, are required to be used, the same sense is to be put on the words of an indictment which they bear in ordinary acceptation: and if the sense of any word be in ordinary

acceptation ambiguous, it shall be construed according as the context and subject-matter require it to be, in order to make the whole consistent and sensible. The word *until* may therefore be construed either exclusive or inclusive of the day to which it is applied, according to the context and subject matter.

R. v. *Stevens and Agnew.* 5 E. R. 244

2. Therefore, where an information on the stat. 33 *G.* 3. *c.* 52. § 62. prohibiting *officers* of the *East India* Company, *residing in* India from receiving presents, charged that the defendants being *British subjects* on the 1st *January*, 1794, and from thence for a long time, to wit, *until* the 29th *November*, 1795, held certain offices under the Company, and *during all that time resided in the* East Indies; and that *whilst* they held the said offices *as aforesaid*, and *whilst they resided in the* East Indies *as aforesaid*, to wit, *on the 29th of* November, 1795, they received certain presents: held that the context shewed that the word *until* was to be taken *inclusive* of the 29th *November*, 1795. *ib.*

3. But that if it had been incapable of receiving an *inclusive* construction, the words under the first videlicet, "*until the 29th of November*, 1795," could not have been rejected as surplusage; for that can never be where the allegation is sensible and consistent in the place where it occurs, and not repugnant to *antecedent* matter, though laid under a *videlicet*, and however inconsistent with an allegation *subsequent*. *ib.*

4. Where an evil intent, accompanying an act, is necessary to constitute such act a crime, the intent must be alleged in the indictment, and proved; though it be sufficient to allege it in the prefatory part of the indictment. But where the act is in itself unlawful, the law infers an evil intent, and the allegation of such intent is merely matter of form, and need not be proved by extrinsic evidence on the part of the prosecutor.

R. v. *Phillips.* 6 E. R. 464

(And see *ante* l. 11.)

5. Time and place must be added to every material fact in an indictment.

5 T. R. 607

6. Upon a demurrer to an indictment found in an inferior court, objections may be taken as well to the *jurisdiction* of such court as to the *subject-matter* of the indictment.

R. v. *J. Fearnley.* 1 T. R. 316

7. And where the caption of the indictment stated the court of Quarter Sessions, where such indictment was found to have been held on an impossible day, it was fatal. 1 T. R. 316

8. Stating the defendant to be late of *W.*, and laying the offence to be *at the parish aforesaid*, was held not to be sufficiently certain. 5 T.R. 162

9. An indictment on the stat. 23 *G.* 3. *c.* 13. for enticing artificers to go out of the kingdom, &c. alleged that the defendant contracted with the manufacturer, &c. "to go out of this kingdom of *Great Britain* into a foreign country called *America*, such foreign country not being then within the dominion of or belonging to the crown of *Great Britain*:" and held good after verdict.

R. v. *Myddleton.* 6 T. R. 739

10. It is no objection in arrest of judgment, that the indictment contains several charges of the same nature in the different counts. 3 T. R. 98

11. But in the case of felony, if it appear before the prisoner has pleaded or the jury are charged, that he is to be tried for *separate offences*, the judge in his discretion may quash the indictment.

3 T. R. 106

12. Or if the judge do not discover it till after the jury are charged, he may put the prosecutor to his election on which charge he will proceed.

3 T. R. 106

13. In an indictment for an offence at common law, a conclusion of *contra formam statuti* may be rejected as surplusage. *R.* v. *Matthews.* 5 T. R. 162

14. In an indictment against a receiver of stolen goods for a misdemeanor, it is not necessary to aver that the principal has not been convicted: but such a fact is matter of defence to be proved by the defendant.

R. v. *Baxter.* 5 T. R. 83

15. An indictment that the defendant was appointed overseer of the poor of the parish of *A.*, "and that he afterwards refused to take the said office of overseer of the parish, to which he was so appointed," was held good on demurrer.

R. v. *J. Burder.* 4 T. R. 778

16. In an indictment against a public officer, for breach of duty, it is suf-

ficient to state generally that he is such officer, without shewing his appointment.

R. v. *E. J. Holland.* 5 T. R. 607

17. In an indictment against a servant of the *East India* Company for offences in *India*, it is sufficient to charge him with a *wilful* breach of duty, without adding that it was corrupt. 5 T. R. 607

18. In an indictment against an officer for disobedience of orders, it is not necessary to aver that the orders have not been revoked, or that they are in force: if they be not still in force, it is a matter of defence. 5 T. R. 607

19. Where a public officer is charged with a breach of duty, which duty arises from certain acts within the limits of his government, it is not necessary to aver, in an indictment against him, that he had notice of those acts; he is presumed from his situation to know them. 5 T. R. 607

20. A charge in an indictment against an officer with a breach of orders in not prosecuting a war "with all possible vigour and decision," is too uncertain, even though the charge be made in the very words of the order given to him. 5 T. R. 607

21. In an indictment for conspiring to pervert the course of justice by producing a false certificate (under the hands of justices of the peace, that a road indicted is in repair) in evidence to influence the judgment of the court; it is not necessary to set forth that the defendants knew at the time of the conspiracy that the contents of the certificate were false; it is sufficient that for such purpose they agreed to certify the fact as true, without knowing that it was so. 6 T. R. 619

(See also title CERTIFICATE.)

22. In an indictment on 37 *G.* 3. *c.* 70. making it felony to endeavour to seduce a soldier or sailor from their duty, it is sufficient to charge an *endeavour*, &c. without specifying the means employed. *R.* v. *Fuller, (in Cam. Scac.)* 1 B. & P. 180

(See CONVICTION II. 18.)

23. Under a charge that *A.* endeavoured to incite *B.* to mutiny, being a soldier, knowledge of *B.*'s being a soldier is implied. The word advisedly in such case is equivalent to *scienter*. 1 B. and P. 181

24. *Semble*—That if one *endeavour* to comprize two separate offences, a count in an indictment charging that *endeavour* may contain those two offences. *ib.*

25. An indictment charging that defendant having in his possession a bill of exchange, *purporting* to be directed to one *J. King*, by the name and description of *J. Ring*, forged the acceptance of the said *J. King*, &c. is bad; because *purport* means what appears on the face of the instrument, and the bill did not purport to be drawn on *J. King*.

R. v. *Reading, O. B.* 1793 1 E. R. 180, *n.*
R. v. *Gilchrist, O. B.* 1795, *S. P. ib.*

26 So where the indictment charged that the bill *purported* to be directed to *Richard Down, Henry Thornton, John Freer*, and *John Cornwall*, jun. by the name and description of Messrs. *Down, Thornton & Co.* *R.* v. *Esdall, Southampton, Sp. Ass.* 1798. *ib.*

27. An indictment for forgery must set out the forged instrument in words and figures. *R.* v. *Mason, Northumberland Sum. Ass.* 1791. *ib.*

28. But upon an indictment for publishing a forged *receipt for money*, with the name *Stephen Withers*, &c. for the sum of 1*l.* 4*s.* it was holden sufficient to set forth only the receipt itself as follows: "8th *March*, 1773. Re- "ceived the contents above, by me "*Stephen Withers;*" without setting forth the account itself to which such receipt referred, and at the foot of which it was subscribed; that account being only evidence to make out the charge. *R.* v. *Testick, Bodmin Sum. Ass.* 1774. *ib.* 181, *n.*

29. In an indictment on the 15 *G.* 2. *c.* 28. § 3. it is not necessary to aver that the defendant is a common utterer of false money. *R.* v. *Smith.* 2 B. & P. 127

30. In an indictment on the 39 *G.* 3. *c.* 85. against a servant for embezzling money received on his master's account, it is not sufficient to follow the words of the statute, but there must be a positive allegation that the money was the property of the master as in the case of larceny.

R. v. *M'Gregor.* 3 P. & B. 106

31. If a servant receive money for his master in the county of *A.*, and being called upon to account for it in the county of *B.*, there deny the receipt of it, he may be indicted for the embezzlement in the latter county.

R. v. *Taylor, O. B.* 1803. 3 B. & P. 596

32. A government storekeeper, resident in *Antigua*, transmitting false vouchers to his agent in *London*, who delivered them at the custom-house there, unknowing of the fraud, is indictable in *London*, as if for his own act there. *R.* v. *Munton*, Sittings after *Michaelmas* term, 1793, (cited). 6 E. R. 590

34. The court will not quash a defective indictment on the motion of the prosecutor after plea pleaded, before another good indictment be found.
R. v. *Dr. Wynn.* 2 E. R. 226

35. An indictment for an assault, false imprisonment, and rescue, stated that the Judges of *the court of record of the town and county*, &c. of P., issued their writ, directed to *T. B. one of the Serjeants at Mace of the said town and county*, to arrest *W.*, by virtue of which *T. B.* was proceeding to arrest *W. within the jurisdiction of the said court*, but that the defendant assaulted *T. B. in the due execution of his office*, and prevented the arrest: held such indictment bad; it not appearing that *T. B.* was *an officer of the court:* and that there could not be judgment after a *general* verdict on such a count as for a common assault and false imprisonment, because the jury must be taken to have found that the assault and imprisonment was for the cause therein stated, which cause appears to have been that the officer was attempting to make an illegal arrest of another, which being a breach of the peace, the defendant might, for aught appeared, have lawfully interfered to prevent it.
R. v. *Osmer.* 5 E. R. 304

36. The stat. 37 *G.* 3. *c.* 123; makes it felony for any person in any manner or form whatsoever to administer, &c. any oath purporting or intended to bind the party to engage in any seditious purpose, or to disturb the public peace, or to be of any society, &c. formed for any such purpose, &c. or not to inform or give evidence against any associate, &c. And by § 4. it shall not be necessary in an indictment for any such offence to set forth the words of the oath, but it shall be sufficient to set forth the purport of it, or some material part hereof: held that an indictment charging that the defendants administered to *J. H.* an oath intended to bind him not to inform or give evidence against any member of a certain society formed to disturb the public peace for any act or expression of his or theirs, &c. is good without alleging the tenor or purport of the oath to be set forth, and without shewing in what manner the public peace was meant to be disturbed by such society.
R. v. *Moors.* 6 E. R. 419

37. It is no objection, *on demurrer*, that several different defendants are charged in different counts of an indictment for offences of the same nature; though it may be a ground for application to the discretion of the Court to quash the indictment.
R. v. *Kingston & al.* 8 E. R. 41

38. And an indictment against certain commissioners for a contempt of an order of Sessions in not paying the costs of an appeal awarded against them, stating, generally, that the party appealed to the Sessions against a certain notice in writing under the hands of five commissioners acting in the execution of the statute, and which notice was made, or purported to be made, under the powers to them given by the act, seems sufficient; for the Court will presume, as against the persons issuing such notice, that it was signed by them when lawfully assembled at a public meeting holden by virtue of the act. 8 E. R. 41

39. But counts in the indictment stating an appeal against a notice in writing, signed by *A.*, *B.*, *C.*, *D.*, and *E.*, five of the commissioners, and an order by the Sessions that *the commissioners acting under the statute, and being the respondents in the said appeal*, on service of the said order, should pay the appellant 10*l.* costs of appeal; and alleging *service* of the order *on those five and others acting as commissioners*, &c.; and then charging, that at a subsequent meeting held by virtue of the act, *A.*, *B.*, *(omitting C.) D.*, and *E.*, and also *F. and G.*, commissioners, were present and acting, and formed a majority, a demand of the 10*l.* costs was made on *those six*, which they refused to pay: and other like counts, charging service of the order upon part only of those who were indicted for a contempt of it: were on general demurrer holden by the Court of K. B. to be bad. And the offence being laid *jointly* against the several sets of defendants in each count, the Court could not give judgment, on such an indict- even against the *four* who were parties

to the appeal, and on whom service of the order was alleged; there being no one count including those only.
8 E. R. 41

IV. *Evidence and Plea on Indictments.*

1. In an indictment for forging a bill of exchange, all the judges held that it need not be stamped in order to be received in evidence; though in stat. 23 *G.* 3. *c.* 49. imposing a duty on such instruments, it is said that no bill of exchange shall be received in evidence unless it be first duly stamped.
R. v. *Hawkeswood.* 2 T. R. 606

2. Proof of words spoken *to* a person will not support an indictment charging that the defendant spoke them *of* such a person.
R. v. *Berry.* 4 T. R. 217

3. If in the statement of any offence by statute, there be any description in the negative, the affirmative of which would be an excuse for the defendant, the proof of it lies on him, and it need not be stated in the indictment.
5 T. R. 83

4. On an indictment on stat. 17 *G.* 3. *c.* 26 § 7. for taking more than 10*s.* in the 100*l.* for brokerage, *&c.*, it is not necessary to prove that the defendant took the exact sum laid in the indictment, though it be not laid under a *viz.* *R.* v. *Gillham.* 6 T. R. 295

5. And on the trial of such indictment, it is to be left to the jury to consider whether the excess were really taken as a fair charge for drawing the writings, &c., or whether it were not so taken as a device to avoid the statute.
6 T. R. 265

6. Upon an indictment for perjury, in falsely taking the freeholder's oath at an election of a knight of the shire *in the name of* J. W.; it appearing by competent evidence that the freeholder's oath was administered to a person who polled on the second day of the election by the name of *J. W.*; who swore to his freehold and place of abode; and that there was no such person; and that the defendant voted on the second day, and was no freeholder; and some time after boasted that he had *done the trick*, and was not paid enough for the *job*, and was afraid he should be *pulled for his bad vote*; and it not appearing that more than one false vote was given on the second day's poll, or that the defendant voted in his own name, or in any other than the name of *J. W.*; held that there was sufficient evidence for the jury to presume that the defendant voted *in the name of* J. W., and consequently to find him guilty of the charge as alleged in the indictment.
R. v. *Price.* 6 E. R. 323

7. Upon an indictment on the statute 37 *G.* 3. *c.* 123. making it felony to administer certain unlawful oaths, where the witness swearing to the words spoken by way of oath by the prisoner when he administered the same, said that he held a paper in his hand at the same time when he administered the oath, from which it was supposed that he read the words; yet held that parol evidence of what he in fact said, was sufficient, without giving him notice to produce such paper.
R. v. *Moors.* 6 E. R. 421
(And see *ante* III. 36.)

8. And where the oath on the face of it did not purport to be for a seditious purpose; yet held that evidence might be given to shew that the *brotherhood* therein referred to was a seditious society. *ib.*

9. Upon an indictment for disposing of and putting away a forged bank note, knowing it to be forged, the prosecutor may give evidence of other forged notes having been uttered by the prisoner, in order to prove his knowledge of the forgery. *R.* v. *Wylie.* N. R. 92

10. S. P. *R.* v. *Tattersall. Lancaster Ass.* 1801. *cor. Chambre*, J. (cited). N. R. 93

11. A forged bill was found upon *A.* who then resided in *Wiltshire*, and had resided there about a year under a false name, but which bill bore date at a time when *A.* lived in *Somersetshire*, in the neighbourhood of the person whose signature was forged, and more than two years previous to the bill being found upon him. On an indictment against *A.* for forgery of the note in *Wiltshire*, this was held not to be sufficient evidence of the offence having been committed in that county.
R. v. *Crocker.* 2 N. R. 87

12. Upon an indictment on 43 *G.* 3 *c.* 58. § 1. for feloniously setting fire to a house, with intent to defraud the insurers, an unstamped memorandum indorsed on a stamped policy effected by deed, is not admissible in evidence against the prisoner.
R. v. *Gilson.* 1 W. P. T. 95

13. One was indicted in *Middlesex* for perjury committed in an affidavit; which indictment, after setting out so much of the affidavit as contained the false oath, concluded with a *prout patet* by the affidavit affiled in the Court of B. R. at *Westminster*, &c. and on this he was acquitted: after which he was indicted again *in Middlesex* for the same perjury, with this difference only, that the second indictment set out the jurat of the affidavit, in which it was stated to have been sworn *in London;* which was traversed by an averment that in fact the defendant was so sworn *in Middlesex* and *not in London:* and the Court of K. B. held that he was entitled to plead *autrefoits acquit;* for the *jurat* was not conclusive as to the *place* of swearing; and the same evidence as to the real place of swearing the affidavit might have been given under the first as under the first as under the second indictment; and therefore the defendant had been once before put in jeopardy for the same offence. *R.* v. *Emden.* 9 E.R.437

V. *Judgment on.*

1. When a defendant in an indictment is brought up for judgment, his acts subsequent to the trial may be considered either by way of aggravating or mitigating the punishment, even though they be separate and distinct offences, for which he may be afterwards punished. But in such cases the court will take care not to inflict a greater punishment than the principal charge itself will warrant.

R. v. *Withers.* 3 T. R. 428
and *R.* v. *Walter.* 3 T. R. 432

2. On an indictment for a nuisance in erecting a wall across a road (not for *continuing* the nuisance), it is not necessary to judge that the nuisance be abated. *R.* v. *the Justices of the W. R. of Yorkshire.* 7 T. R. 467
and *R.* v. *Stead.* 8 T. R. 143

3. But where it is stated in the indictment to be an existing nuisance, there must be judgment to abate it.
8 T. R. 143

4. If the court be satisfied that a nuisance indicted is already effectually abated, before judgment is prayed upon the indictment, they will not in their discretion give judgment to abate it. And they refused to give such judgment upon an indictment for an obstruction in a public highway; which highway, after the conviction of the defendant, was regularly turned by an order of magistrates, and a certificate obtained that the new way was fit for the passage of the public, and on affidavits that so much of the old way indicted as was still retained was freed from all obstruction. *R.* v. *Incledon.* 13 E.R.164

INFANT.

1. The Court of C. P. refused to discharge a defendant on a common appearance on the ground of infancy.

Madox v. *Eden.* 1 B. & P. 480

2. *Assumpsit* on an account stated does not lie against an infant.

Trueman v. *Hurst.* 1 T. R. 40

3. Even though the particulars of the acount were for necessaries.

Bartlett v. *Emery,*
II. 2. *G.* 2. *B. R.* 1 T. R. 42, *n.*

4. It seems that an infant may bind himself by a promissory note given for necessaries, and for instructing him in the business of a hair-dresser. 1 T. R. 40

5. An infant, a captain in the army, is liable to pay for a livery ordered for his servant, as necessaries; but not for cockades ordered for the soldiers of his company.

Hands v. *Slaney.* 8 T. R. 578

6. If an agreement made by an infant be for his benefit at the time, it shall bind him. *Maddon dem. Baker* v. *White.*
2 T. R. 159

7. An infant slave in the *West Indies* executed an indenture, by which he covenanted to serve *B.* for a certain term of years as his *servant*, and *B.* covenanted to do certain things on his part; *B.* then came to *England* with the slave: In an action against *A.* who had seduced him from the service of *B.*, *A.* was not permitted to allege that the contract was void as being made by an infant and a slave, and therefore that the declaration, which stated him to have been retained as a servant for a term of years was not proved; for the Court (of C. P.) held that the *effects of such a contract* might be the *manumission* of the slave, and consequently that it was for his own benefit, and therefore that it was, at most, only voidable by the infant himself. *Keane* v. *Boycott.* 2 H. B. 511

8. A warrant of attorney given by an infant was declared by the Court of C. P. to be *absolutely void*, and that court refused to confirm it; though

the infant appeared to have given it, (knowing that it was not valid) in collusion with another.

Saunderson v. *Marr.* 1 H. B. 75

9. An infant can on no account bind himself in a bond with a penalty conditioned for payment of interest as well as principal.

Fisher v. *Mowbray.* 8 E. R. 330

10. If the plaintiff reply to a plea of infancy, that the defendant after he had attained 21 confirmed his promise, and the defendant rejoined that he did not, the plaintiff need only prove a promise, and the defendant must shew that he was under age at the time.

Borthwick v. *Carruthers.* 1 T. R. 648

11. An infant cannot pray the parol to demur in any other stage of the proceeding than at the time of pleading.

Derisley v. *Custance.* 4 T. R. 75

12. An infant devisee sued by a specialty creditor of the devisor cannot pray the parol to demur by reason of his nonage; such privilege of an heir who is in by descent not being extended to a devisee by the stat. 3 *W. & M. c.* 14. which charges the land in his hands for the specialty debts of the devisor. *Plasket, Ex.* v. *Beeby & al* 4 E. R. 485

13. An infant may consider whoever enters on his estate, as entering for his use. (See TRUSTEE.) 7 T. R. 386

14. A plaintiff cannot convert an action founded on a contract into a tort, so as to charge an infant defendant. Therefore where the plaintiff declared that at the defendant's request he had delivered a mare to the defendant to be moderately ridden, and that the defendant maliciously intending, *&c.* wrongfully and injuriously rode the said mare so that she was damaged, *&c* it was holden that the defendant might plead his infancy in bar, the action being founded on a contract.

Jennings v. *Rundall.* 8 T. R. 335

15. The court refused on motion to discharge an infant, who had sued without prochein amy or guardian, and was in execution for the costs.

Finlay v. *Jowle.* 13 E. R. 6

INFERIOR COURT.

1. In an inferior court the declaration must allege that the money was *bad and received* within the jurisdiction, as well as that the defendant *promised to pay* within it.

Trevor v. *Wall.* 1 T. R. 151

2. But in an action on the case for rescuing a debtor taken upon mesne process sued out of an inferior court, it was holden not to be sufficient ground for arresting the judgment after verdict that it was not alledged that the cause of action arose within the jurisdiction:—or that it was not alleged that the party below did not appear at the return of the writ..

Bentley v. *Donnelly & al.* 8 T.R. 127

3. If a plea of foreign attachment (in *London*) state the custom to be "that if any person be or hath been indebted to any other person within the said city, &c." it ought to aver that the defendant in the plaint was indebted to the plaintiff within the city.

Morris v. *Ludlam.* 2 H. B. 362

4. If a femme covert, sole trader in *London*, be sued in the city courts, the husband should be joined for conformity. *Beard* v. *Webb. in Exch. Cham.* (*in error*). 2 B & P. 93

5. Where one count of a declaration in an inferior court is not laid within the jurisdiction of that court, and the damages are given generally, the objection is fatal upon a writ of error, although there is another good count.

1 T. R. 151

6. No action can be brought in the county court unless the cause of action arise, and the defendant reside, within the country; and if that be not the case the action may be brought in the superior courts, although for a sum less than 40*s.* *Welsh* v. *Troyte,* 2 H. B. 29: *Tubb* v. *Woodward,* 6 T. R. 175: *Smith* v. *O'Kelly.* 1 B. & P. 76

7. And wherever a plaintiff cannot sue in an inferior court, he may sue in the superior courts for a debt under 40*s.*

Busby & al. v. *Fearon.* 8 T. R. 235

8. *A.* delivered goods under the value of 40*s.* to a carrier in *London,* pursuant to an order from *B.* resident in *Leicestershire,* and received the goods in the latter county: held that no action for the goods could be maintained in the county court of *Leicestershire,* and that the Court of Common Pleas, therefore, could not stay proceedings in an action commenced in that court.

Harwood v. *Lester.* 3 B. & P. 617

9. The Court of Conscience at *Newcastle* can only hold plea where both the plaintiff and the defendant reside within the jurisdiction. 8 T. R. 235

10. It is the same with respect to the Court of Requests in *London* under stats. 3 *Jac.* 1 *c.* 15: 14 *G.* 2. *c.* 10. *Brooks* v. *Moravia.* 2 H. B. 220

11. The *Southwark* Court of Requests, act 22 *G.* 3. *c.* 47 cannot be *pleaded* to an action brought in a superior court. *Barney* v. *Tubb.* 2 H. B. 352

12. The proper mode for the defendant to avail himself of it, is by *entering a suggestion* on the record, after verdict at the execution of a writ of enquiry. 2 H. B. 352

13. Where the plaintiff, having obtained judgment on a general demurrer to such a plea, executed a writ of enquiry, on which the damages were assessed at less than 40*s.* five days before the end of the term, and signed final judgment on the last day of the term; the Court of C. P. in the next term refused to direct the prothonotary to review his taxation of costs to the plaintiff, on an affidavit stating the former proceedings, and that the defendant was *resiant* within the jurisdiction of the inferior court; because the defendant ought to have *entered a suggestion, and that before final judgment was signed.* 2 H. B. 352

14. And to entitle himself to such a suggestion, supposing it to be moved for in time, the defendant must state in the affidavit, not only that he is *resiant* within the jurisdiction of, but also that he *is liable to be warned or summoned to, the Court* of Requests. 2 H. B. 523

15. After judgment by default the defendant is *still in court* for many purposes, one of which is that of entering such suggestion. 2 H. B. 523

16. When a defendant, living within the jurisdiction of the Court of Requests at *Westminster*, is sued in one of the superior courts for a debt under 40*s.* he may plead stat. 23 *G.* 2 *c.* 27. in bar. *Taylor* v. *Blair.* 3 T. R. 452

17. But if he omit to do so, the court will not, after verdict, either enter a suggestion on the record, that the defendant lived within that jurisdiction, nor stay the proceedings. 3 T. R. 352

18. Where a public statute for erecting a court of inferior jurisdiction, enacts that "no action for any debt not amounting to 40*s.* and recoverable by that act shall be brought against any person residing within the jurisdiction," &c. such statute is a defence upon the general issue to a party bringing himself within it, who is sued in the superior courts. *Parker* v. *Elding.* 1 E. R. 352

19. The stat. 29 *G.* 2. *c.* 37. does not give power to the courts baron of *Sheffield* and *Ecclesall* to hold suit against persons residing within the jurisdiction of those courts in causes arising without. *R.* v. *Danser.* 6 T. R. 242

20. The stat. 14 *G.* 2. *c.* 10. which enables certain persons to sue for debts under 40*s.* in the Court of Requests in *London*, does not extend to cases where the plaintiff recovers less than 40*s.* in a special action on the case for the breach of an agreement. *Jonas* v. *Greening.* 5 T. R. 529

21. That act only extends to cases where the demand is certain. 5 T. R. 529

22. And only to those cases where the plaintiff is an *inhabitant* within the city of *London.* 5 T. R. 529: *Webb* v. *Brown.* 3 T. R. 535

23. The *London* Court of Requests has jurisdiction by the stat. 39 & 40 *G.* 3 *c.* 104. over a contract for the retention of tithes by the tenant, the value of which was under 5*l.* And therefore if the vicar sue for the same, and recover less than 5*l.* upon a count in assumpsit for a *quantum valebant*, the defendant may enter a suggestion on the roll, stating that he was a freeman and inhabitant of the city of *London*, trading there at the time he was served with the writ, for the purpose of ousting the plaintiff of his costs, under the 12th sect. of the act. *Sanby, Clerk,* v. *Miller.* 5 E. R. 194

24. Where a stockbroker had given bond to the Chamberlain of *London* in 10*l.* conditioned for the payment of 40*s.*, being the amount of the duty payable under stat. 6 Anne. *c.* 16, § 4. annually by brokers in *London*, and refusing to pay the said duty, was summoned for the same before the Court of Requests: the Court of K. B. held that the Commissioners were bound to hear and determine the case, and that the duty of 40*s.* was not merged in the forfeiture of the bond. *R.* v. *London Court of Requests.* 7 E. R. 292

25. The Court of Requests Act for *Southwark*, &c. enacts, that "if in any action, &c. for recovery of any debt sued against any person (within the jurisdiction) in any of the king's courts at *Westminster*, &c. *it shall appear to the Judge*, &c. *that the debt to be re-*

covered by the plaintiff doth not amount to 40*s.* &c." the plaintiff shall pay the defendant costs, &c.: the Court of K. B. held that where the plaintiff's witness proved that the debt, which was originally *above*, was reduced *below*, 40*s.* by *part payment* before the action brought, the case was within the statute. *Clark* v. *Askew.* 8 E. R. 28: See also, *Fountain* v. *Young.* 1 W. P. T. 60

26. The same point was ruled on the *London* Court of Requests Act, 39 and 40 *G.* 3. *c.* 104.

Horne v. *Hughes.* 8 E. R. 347

27. The *London* Court of Requests Act 39 and 40 *G.* 3. *c.* 104. § 12. provides that if any action be commenced out of that court for any debt not exceeding 5*l.* (within the jurisdiction), the plaintiff shall not, by reason of a *verdict* for him, *or otherwise*, be entitled to costs, &c: the Court of K. B. held that after judgment by default, and the damages assessed upon a writ of inquiry, the defendant might come into court and move to stay proceedings on payment of the damages assessed, without costs. *Dunster* v. *Day.* 8 E. R. 239

28. A market gardener who rented a stand with a shed over it in *Fleet* market at an annual rent, which he occupied three times a week on market days till 10 o'clock in the morning; after which, and on all other days, it was occupied by others; does not *keep* a stand within the meaning of the *London* Court of Requests act 39 & 40 G. 3. *c.* 104. so as to be privileged to be sued there for a debt under 5*l.*

Grey v. *Cook.* 8 E. R. 336

29. Attornies, *plaintiffs*, are not within the *London* Court of Conscience Act 39 & 40 *G.* 3. *c.* 104. compellable to sue there for a debt under 5*l.* at the peril of costs.

Board v. *Parker.* 7 E. R. 46

30. Neither are they, though the defendant were also an attorney.

Hodding v. *Warrand.* 7 E. R. 50

31. An action upon the case for negligence in driving the plaintiff's carriage contrary to an implied *assumpsit*, is not a demand coming within the jurisdiction of the *Southwark* Court of Conscience Act. *Lawson* v. *Moggridge.* 1 W. P. T. 396

32. The defendant is entitled to a suggestion for costs under the *London* Court of Requests Act, though it appears that if the plaintiff had postponed the commencement of his action a few months, his cause of action would have been good for more than 40*s.* *Tucker* v. *Crosby.* 2 W. P. T. 169

33. A person plying as a porter in the city of *London*, and resorting to a house of call there, but not lodging in the city, is not a person "seeking his bread in London," within the London Court of Requests Acts, 39 & 40 *G.* 3. *c.* 104. *Skinner* v. *Davis.* 2 W. P. T. 196

34. If the plaintiff in an action of assault having recovered only 20*s.* damages whereby he is entitled to no more than 20*s.* costs bring an action on the judgment, and obtaining judgment by default in that action, enter it up for debt and costs, the court on affidavit of the defendant being resident in the city of *London*, and liable to be summoned to the Court of Requests will, under the 39 & 40 *Geo.* 3. *c.* 104. set aside the judgment as to the costs.

Foote v. *Coare.* 2 B. & P. 588

35. If a defendant reside in *Middlesex*, and keep a warehouse within the city of *London*, jointly with another, but after the commencement of an action against him for a small demand, tell the plaintiff that he does not keep the warehouse in question; and the plaintiff, upon inquiring in the neighbourhood of the warehouse, can obtain no intelligence respecting the defendant, the court will not, under the 39 & 40 G. 3. *c.* 10., exempt the defendant from payment of costs, on the ground of the verdict being under 5*l.*; and that he ought to have been summoned to the court of requests.

Jefferies v. *Watts.* 1 N. R. 153

36. The Court of *B. R.* will not mitigate a fine imposed by an inferior court (by the Court of Great Sessions in *Wales* on the sheriff of the county for not attending); the record whereof has been removed by *certiorari*. *R.* v. *E. L. Loveden.* 8 T. R. 615

INFORMATION.

1. The Court granted an information against a person refusing to take on him the office of sheriff, because the vacancy of the office occasioned a stop of public justice, and the year would be nearly expired before an indictment could be brought to trial. 2 T. R. 731

2. A criminal information having been granted against the defendant, he, before the trial at *Nisi Prius*, distributed handbills in the assize town, vindicating his own conduct, and reflecting

on the prosecutor's. This matter being disclosed to the Judge at *Nisi Prius* by an affidavit, was held a sufficient ground to put off the trial; and that affidavit being returned to this court, they granted another information on it against the defendant for such criminal conduct, considering the affidavit taken at *Nisi Prius* as taken under the authority of this court.
R. v. *Joliffe.* 4 T. R. 285

3. A party applying for an informatiou must waive his right of action; but if the court on hearing the whole matter, are of opinion that it is a proper subject for an action, they may give the party leave to bring it.
R. v. *Sparrow.* 2 T. R. 198

4. The court will not grant an information against a magistrate for having improperly convicted a person, unless the party complaining make an exculpatory affidavit denying the charge.
R. v. *Webster.* 3 T. R. 388

5. The court will grant a rule *nisi* for a criminal information at the end of a term against a magistrate for mal-practices *during the term*, but not for any misconduct before the term.
R. v. *Smith.* 7 T. R. 80

6. An affidavit by *A.* stating that *B.* had brought him a challenge from *C.*, and that *B.* had refused to make an affidavit that *C.* sent him with it, is not evidence in which this court will grant a rule *nisi* for a criminal information against *C.* for sending the challenge. *R.* v. *Willet.* 6 T. R. 294

7. The defendant on an information on stat. 24 *G.* 3. *c.* 25. § 64. respecting *East India* delinquents, must make his application for a *mandamus* for the examination of witnesses, within the four first full days if at all, after plea pleaded. *R.* v. *Holland.* 4 T. R. 662

8. When a statute creates a penalty, and says that one moiety shall be to the use of the king, and the other to a common informer, the king may sue for the whole by an information filed in *B. R.* by the Attorney-general, unless a common informer has commenced a *qui tam* suit for the penalty.
R. v. *Hymen.* 7 T. R. 536

9. Evidence to the character of a defendant is not admissible upon the trial of an information in the Exchequer. *The Attorney General* v. *John Bowman, Sittings at Westminster, cor. Eyre,* Ch. B. 16 June, 1791. 2 B. & P. 532, *n.*

10. Information granted for endeavouring to procure the appointment of certain persons to be overseers of the poor, with a view to derive a private advantage to the party. *R.* v. *Joliffe, East,* 32 *Geo.* 3. (cited.) 1 E. R. 154

11. The court refused a criminal information against a magistrate for returning to a writ of *certiorari* a conviction of a party in another and more formal shape than that in which it was first drawn up, and of which a copy had been delivered to the party convicted by the magistrate's clerk, the conviction returned being warranted by the facts. *R.* v. *Barker.* 1 E. R. 186

12. An information at common law for a conspiracy between the captain and purser of a man-of-war for planning and fabricating false vouchers to cheat the crown (which planning and fabrication were done upon the high seas), is well triable in *Middlesex*, upon proof *there* of the receipt by the commissioners of the navy of the false vouchers transmitted thither by one of the conspirators through the medium of the post, and the application *there* of a third person, a holder of one of such vouchers (a bill of exchange) for payment, which he *there* received.
Rex v. *Brisac and Scott.* 4 E. R. 164
(And see INDICTMENT III. 31-2.)

13. So where an indictment for a conspiracy was laid in *Middlesex*, where acts done by some of the conspirators were proved, acts done by others of the conspirators in other counties were given in evidence against them.
R. v. *Bowes and others*, in 1787, cited 4 E. R. 171

INN-KEEPER.

Though an inn-keeper refuse to take charge of goods till a future day, because his house is full of parcels, still he is liable to make good the loss of them, if the owner stop *as a guest*, and the goods be stolen during his stay.
Bennet v. *Mellor.* 5 T. R. 273

INQUIRY, WRIT OF, AND INQUISITION.

1. If a defendant sued on a bill of exchange, suffer judgment by default, he admits that he is liable to the amount of the bill; and therefore though the bill must be *produced* on executing the writ of inquiry, it need not be *proved.*
Green v. *Hearne.* 3 T. R. 301

2. The only reason for producing the bill on the writ of inquiry, is to see whether or not any part of it has been paid. 3 T. R. 301

3. Defendant having suffered judgment by default in an action on a bill of exchange, the Court of K. B. referred it to the Master to see what was due for principal and interest, without executing a writ of inquiry.
Shepherd v. *Charter*. 4 T. R. 275

4. So in C. P. it is referred to the prothonotary; either on a promissory note or bill of exchange. *Rashley* v. *Salmon*, 1 H. B. 252: *Andrews* v. *Blake*, 1 H. B. 529: *Longman & al.* v. *Fenn*. 1 H. B. 541

5. So where the first count in a declaration was on a bill of exchange, to which count there was a demurrer and judgment for the plaintiff, though there was a plea to the other counts on which issue was joined, the court of K. B. referred it to the Master to see what was due on the first count.
Duperoy v. *Johnson*. 7 T. R. 473

6. On an interlocutory judgment, in debt on a judgment in an action brought on a bill of exchange, the Court (of K. B.) refused to refer it to the Master to ascertain the damages sustained by the plaintiff.
Nelson v. *Sheridan*. 8 T. R. 395

7. So where the affidavit stated that the action was brought to recover the amount of a promissory note, but that cause of action did not appear on the face of the declaration; the court refused to refer it to the Master, after a judgment by default.
Osborne v. *Noad*. 8 T. R. 648

8. The Court of K. B. referred it to the Master to compute what was due for principal and interest on a mortgage, in an action of covenant.
Berthen v. *Street*. 8 T. R. 326

9. So in covenant for non-payment of rent, that court referred it to the Master to compute what was due.
Byrom v. *Johnson*. 8 T. R. 410

10. Where the defendant suffered judgment by default in an action of *assumpsit* on a foreign judgment, the Court of K. B. refused to refer it to the Master to see what was due, and to give the plaintiff leave to enter up final judgment for such sum, without executing a writ of inquiry. *Messin* v. *Lord Massareene & Ux*. 4 T. R. 493

11. Defendant having suffered judgment by default in an action on a bill of exchange for 200*l*. *Irish* money, the court refused to refer it to the Master to see what was due for principal, interest, and costs. *Maunsell* v. *Lord Massareene*. 5 T. R. 87

12. At the execution of a writ of inquiry after judgment on demurrer, it is not competent to the defendant to controvert any thing but the sum in demand.
De Gaillon v. *L'Aigle*. 1 B. & P. 368

13. After judgment by default in an action of debt on a judgment, the plaintiff may sue out a writ of inquiry.
Blackmore v. *Flemyng*. 7 T. R. 446

14. And the jury may give interest by way of damages. 7 T. R. 446

15. Final judgment may be entered upon a bail bond, without executing a writ of inquiry.
Moody v. *Pheasant*. 2 B. & P. 446

16. In the court of *C. B.* it was referred to the prothonotary, in debt on bond after judgment by default, to tax interest by way of damages, it being at the plaintiff's option to have interest so taxed, or to have a writ of inquiry.
Holdipp v. *Otway*, cited. 7 T. R. 447

17. So they will refer a bill of exchange to the prothonotory, to compute principal interest, *exchange*, *re-exchange*, and costs.
Goldsmid v. *Taite*. 2 B. & P. 55

18. But not to compute charges and expenses. *ib.*

19. The court set aside an inquisition taken on a writ of inquiry because some of the jury were debtors in prison, and taken out of custody for the purpose of attending. *Stainton* v. *Beadle*, 4 T. R. 473:—*Turner* v. *Clarke (there cited)*.

20. If notice of a writ of Inquiry, to be executed at a particular hour and place, be continued, the notice of continuance need not express any hour or place. *Jones* v. *Chune one, &c.* 1 B. & P. 363

21. Notice of executing a writ of inquiry is in future to be given to the agent in town, and not to the attorney in the country.
Hayes v. *Perkins*. 3 E. R. 568

22. The Court of K. B. will not set aside the inquisition of a jury summoned by the sheriff to inquire in whom the property of goods seized by him under a *fi. fa.* is vested.
Roberts v. *Thomas*. 6 T. R. 88

23. If issue be joined on one of three pleas, and judgment be entered by de-

fault upon the two others, the plaintiff cannot execute a writ of inquiry on those pleas on which he has judgment, but must award jury process *tam ad triandum quam ad inquirendum.*

Dicker v. *Adams.* 2 B. & P. 163

INSOLVENTS, AND INSOLVENT ACTS.

(And see References in Table of Titles.)

1. It is sufficient evidence of insolvency that a person has compounded with his creditors. 5 T. R. 218, *n.* (See title AGREEMENT III.)

2. If a defendant be arrested on a *ca. sa.* and escape, and be afterwards retaken, and committed to prison in the next term, he may apply in the following term to be discharged under the Lord's act (32 *G.* 2. *c.* 28.); for the words in § 13 of that stat. "*charged in execution,*" mean being detained within the walls of the prison.

Vaughan v. *Durnell.* 4 T. R. 367

3. Where a prisoner had been brought into the court to be discharged under the Lord's act, and upon his examination the Court of C. P. had refused to discharge him; that court would not afterwards discharge him under that act, though he made affidavit of circumstances in answer to the cause shewn, on his examination, against his discharge, and that those circumstances were not *then* disclosed, owing to a mistake: the court also held that the 5th section of 26 *G.* 3. *c.* 44. was only meant to remedy a neglect, in not taking the benefit of the Lord's act, *within the time limited* by that act. *Thornton & al* v. *Dunphy.* 1 H. B. 101

4. But the Court of K. B. held that where a prisoner had lost the benefit of the Lord's act, 32 *G.* 2. *c.* 28., by the ignorance or mistake, or even *misconduct of an agent,* he might afterwards be discharged under 26 *G.* 3. *c.* 44., on the ground that that act provides relief for those who have neglected to take advantage of the former act through *ignorance or mistake.*

Pearce v. *Taylor.* 4 T. R. 231

5. The statutes for the relief of insolvent debtors, charged in execution on process issuing out of *any of the courts of law,* extend to inferior as well as superior courts. *R.* v. *The Bailiffs of Ipswich.* 7 E. R. 84

6. But the application in both cases must be made before the end of the *next term,* after the prisoner is charged in execution, except the neglect can be shewn to have arisen from ignorance or mistake. 7 E. R. 84

7. If a prisoner brought up to be discharged under § 16 of the Lord's act, 32 *G.* 2. deliver a false schedule, and is remanded, the court will not at the instance of a creditor, even with the prisoner's consent, order him to be brought up a second time, for the purpose of amending his schedule, and assigning over that property which he had before concealed.

Hutchins v. *Hesketh.* 1 B. & P. 143

8. A defendant in execution for the contempt, and for the costs, on a *quo warranto* information, may be discharged under the Lord's act.

R. v. *Pickerill.* 4 T. R. 809 (See title ARREST IV.)

9. So may an attorney in custody on an attachment for not paying over money received by him in the course of a suit. *R.* v. *Davis.* 1 B. & P. 336 (See EXECUTION IV.)

10. But a prisoner in custody for a contempt of Chancery in not answering, and whom that court refused to discharge, except on payment of fees, cannot be discharged under an insolvent act, 34 *G.* 3. *c.* 69.: his contempt not consisting in the non-payment of money.

Ex parte Lawrence. 1 B. & P. 477

11. Only those prisoners for debt, who were in custody on the 12th *February,* 1794, and have continued *in the same prison* to the time of their being carried to the Sessions to be discharged, are entitled to the relief given by the stat. 34 *G.* 3. *c.* 69.

R. v. *Jones.* 6 T. R. 28

12. If an insolvent debtor brought up to the Sessions under that insolvent act be remanded on a charge against him of having obtained money by false pretences, under § 37, and he give notice that he will disprove the charge at a subsequent adjournment of the Sessions, he is entitled to be brought up to the adjourned sessions for that purpose. *R.* v. *The Justices of Surry.* 6 T. R. 76

13. The effects acquired by an insolvent after his discharge under that act are liable to be taken in execution for a debt due before.

Spalton v. *Moorhouse,* 6 T. R. 366

14. The defendant having been charged in execution for the penalty of 1000*l.* in a bond (which became forfeited for non-payment of the instalment of an annuity secured thereby on the day previous to the last insolvent act), the court refused to order that sum to be reduced in the marshal's book to the sum actually due for the arrears of the annuity, in order that he might take the benefit of that act.

Judd v. *Evans.* 6 T. R. 399

15. A prisoner who is taken in execution for a sum greater than that to which the benefit of an insolvent act (33 *G.* 3. *c.* 5.) is extended, and afterwards reduces his debt below that sum, is not entitled to be discharged under that act in the next term after he has so reduced his debt, unless it be also the next term after he was taken in execution.

Ex parte Hubbard. 1 B. & P. 423

16. A defendant in custody under a writ *de excommunicato capiendo*, for contumacy in not paying a sum *for alimony*, and also for *costs*, in the ecclesiastical court, is not entitled to his discharge as an insolvent debtor under the stat. 33 *G.* 3. *c.* 5. § 4., which extends only to persons in custody on such writ for non-payment of *costs and expenses only*.

R. v. *Samson.* 11 E. R. 231

17. An insolvent debtor may be brought up after the ordinary time allowed, on affidavit of his ignorance of the creditor's place of abode till recently before his application; within the saving clause of the stat. 33. *G.* 3. *c.* 5. § 5.

R. v. *Wakefield.* 13 E. R. 190

18. One convicted upon an indictment for an assault, who upon reference to the king's coroner and attorney, was directed by his award to pay so much for costs and so much for compensation to the prosecutrix, is entitled to be discharged as an insolvent debtor under the Lord's act, 32 *G.* 2. *c.* 28., without the aid of the stat. 33. *G.* 3. *c.* 5. *R.* v. *Wakefield.* 13 E. R. 190

19. The insolvent act (34 *G.* 3. *c.* 69.) does not discharge the person of an insolvent (who is entitled to the benefit of that act) from the payment of the arrears of an annuity becoming due after his discharge on a covenant made before the act.

Marks v. *Upton.* 7 T. R. 105

20. But under the words of § 31 of that act, with respect to debts *growing due*, an insolvent is discharged from the payment of a debt on a promissory note or bill of exchange, given before, but not payable until after the day mentioned in the act.

Kinnaird (Lord) v. *Barrow.* 8 T.R. 49

21. Insolvent debtors petitioning under the Lord's act (32 *G.* 2.) and subsequent acts for their further relief, shall be brought into court during term time on *Mondays* and *Thursdays* only.

Reg. Gen. K. B. *H.* 37. *G.* 3. 7 T.R. 454

22. Insolvents shall be brought up in Term on the days appointed for the *London* sittings and on *Saturdays* only. *Reg. Gen.* C.P. *M.* 46. *G.* 3. 2 N. R. 96

23. The court of *C. B.* allowed a prisoner to be brought up under the Lords' act, notwithstanding the body of the notice contained the words "King's Bench" instead of "Common Pleas," the title having been properly altered from King's Bench to Common Pleas, and there not being a sufficient time to give a fresh notice.

Knight v. *Fowler.* 2 N. R. 67

24. Notice of applying to a wrong court for discharge of an insolvent is not cured by the plaintiff's appearing to oppose his discharge. *Scholey & al.* v. *Mansell Powell.* 1 W. P. T. 64

25. The stat. 37 *G.* 3. *c.* 112. authorized the justices of the peace, "at the first or second general quarter session or general session to be holden after the passing of the act, or some adjournment thereof," to discharge insolvent debtors under certain circumstances. the justices in *S.* at an adjourned session, held just after the act passed, the adjournment being of a session holden before the act passed, ordered the keeper of the sheriff's prison to discharge an insolvent: held, 1st, That the adjourned session had no jurisdiction; 2dly, That the officer was not justified in obeying the order of session; 3dly, That the sheriff was answerable in damages to the plaintiff, at whose suit the insolvent was in custody, for the act of the gaoler in discharging the insolvent.

Brown v. *Compton.* 8 T. R. 424

26. An order for the discharge of an insolvent under the Lords' act, (32 *G.* 2. *c.* 28. § 16.) cannot be made by a judge in term, though summonses were taken out in vacation, and the order only delayed until the beginning of term by an irregularity in the affidavits.

Haskins v. *Morris.* 1 B. & P. 92

27. One who was arrested at the suit of the plaintiff, and liberated on bail prior to 1st *March*, 1801, and was afterwards committed in execution at the suit of the same plaintiff before the passing of the Insolvent Act of the 41 *G.* 3. *c.* 70., is entitled to be discharged by the 6th section of that act on the conditions thereby imposed. And this, where he was so taken in execution upon a judgment confessed for the amount of the costs as well as for the original debt, for which he had been arrested by writ out of an inferior court before the first of *March;* the 34th section providing that no person entitled to the benefit of the act shall be imprisoned by reason of any judgment for any debt, costs, &c. owing or growing due before the said 1st of *March*.

Billett v. *M'Carthy*. 2 E. R. 148

28. One who was charged in custody on mesne process for a sum exceeding 1500*l*., on the 1st of *January*, 1804, is not entitled to be discharged under the insolvent debtors' act of the 44 *G.* 3. *c.* 108., though the debt were afterwards reduced by verdict to a sum which, together with the costs, did not amount to 1500*l*.

Ex parte Chiffench. 6 E. R. 347

29. So also where a prisoner was charged in execution on 1st *January*, 1804, for a larger sum than the act extended to, though part of such sum was composed of a debt upon a judgment recovered, which the judgment creditor had an election given to him by the Lord Chancellor to prove under a commission of bankrupt by a future day posterior to 1st *January*, 1804, and which he had elected so to prove and to abandon his judgment before said 1st *January*, though the prisoner was not discharged by a judge's order from such execution till long after such day: held that he was not entitled to the benefit of the act.

Ex parte King. 7 E. R. 90

30. The profits of an ecclesiastical benefice do not pass to the assignees under an insolvent act, though included in the schedule of the insolvent.

Arbuckle v. *Cowtan*. 3 B. & P. 321

31. An insolvent discharged under the 43 *G.* 3. *c.* 70., cannot be holden to bail on a bill drawn and indorsed over by him previous to the 1st *March*, 1803, though not due till after that period.

Sharpe v. *Iffgrave*. 3 B. & P. 394

32. The insolvent debtors' act of the 43 *G.* 3. *c.* 70., only discharges the person, and not the effects of the debtor, as appears by § 38, giving the plea of discharge; though § 4 in the terms of it includes both, but with reference to the subsequent provision.

Bell v. *Saunderson*. 8 E. R. 55

33. A person in custody by attachment for non-payment of money under 20*l*. found due by an award, made a rule of court, is not entitled to his discharge under stat. 48 *G.* 3. *c.* 123., that act being confined in its operation to persons in *execution* upon any *judgment*.

R. v. *Hubbard*. 10 E. R. 408

34. It is not enough in an order for remanding an insolvent debtor by the sessions, to state, that it appeared that he had obtained goods of *A. B.* by false pretences; for either it should be stated in the words of the statute 41 *G.* 3. *c.* 70. § 40. (by virtue of which the order was made), that the party *knowingly and designedly* by false pretences obtained the goods; or at least, that he *fraudulently*, by false pretences, obtained them; the description of the offence adopted by the stat. 46 *G.* 3. *c.* 108. § 39., with reference to the former statute; (which word *fraudulently* is also used in the recital of the section in the former act). And a second order of remand, however regular under the last statute, professing to be made upon view of the former defective order, was therefore quashed. But it is competent to any existing creditor to object to the discharge of an insolvent debtor, on due proof of such former offence described in the statute; though he were not a creditor at the time of such former order of remand made. *R.* v. *Tomkins*. 8 E. R. 180

INSPECTION OF BOOKS, PAPERS, &c.

[See stat. 32 *G.* 3. *c.* 58. § 4. by which members of corporations are entitled to inspect the book of admission of freemen.]

1. Where a corporation was plaintiff in a civil action, the Court of B. R. granted leave to inspect their books to the defendant, as of course. *Lynn Corporation* v. *Denton*. 1 T. R. 689

2. In an action by a corporation for tolls against a stranger, the Court gave the defendant leave to inspect such part

of the deeds, *&c.* in the custody of the corporation as related to the question: and the rule was made on the *town clerk* to grant such inspection on oath. *Barnstaple Corp* v. *Lathey*. 3 T. R. 303: *(and see the note in page* 305.)

3. But on consideration, and hearing counsel, *Lord Kenyon* C. J. and the Court delivered their opinion that such inspection ought not to be considered grantable as matter of course: and in an action by a corporation for tolls, they refused leave to inspect the corporation muniments on the application of the defendant, a stranger to the corporation. *Southamp. Corp.* v. *Graves*. 8 T. R. 590

4. In cases of criminal prosecutions, and in an action for a penalty against a postmaster on stat. 9 *Ann. c.* 10. leave to inspect the books denied. 1 T. R. 689, *n.*

5. Leave to inspect the court rolls, *&c.* of a manor granted on the application of a tenant of the manor, who had been refused that permission by the lord. *R.* v. *Shelley*. 3 T. R. 141

6. But in a question between the *lord and a stranger*, such permission refused. *Talbot* v. *Villeboys, M.* 23. *G.* 3. *B. R.* (cited.) 3 T. R. 142

7. And the Court said, that even a freehold tenant of a manor has no right to inspect the court-rolls, unless some cause is depending in which his right may be involved. *R.* v. *Algood*. 7 T. R. 746

8. Where an information was filed by the Attorney-general against an officer of the *East India* Company on charges of delinquency in *India*, founded upon the report of a Board of Inquiry there, the Court refused to grant the defendant an inspection of that report, and declared that they had no discretionary power to grant it. *R.* v. *Holland*. 4 T. R. 691

9. It is not necessary in penal actions to give notice *to the defendant himself* to produce papers, *&c.*; notice to his agent or attorney is sufficient. *Cates q. t.* v. *Winter*. 3 T. R. 306

10. In trover for goods by the assignees of a bankrupt, where the defence was that they were sold by the plaintiff, and defendant moved for leave to inspect the bankrupt's sale books, the court gave him time to plead, in order that he might gain time to obtain a discovery from the Court of Chancery in the meanwhile. *Whitten* v. *Cazelet*. 2 T. R. 683

11. Where two parties had betted upon a certain event, to ascertain which it was necessary to inspect the public revenue books; and the proper officer was served with a *subpœna duces tecum*; Lord *Mansfield*, and Mr. Justice *Ashhurst*, severally held at *nisi prius* that the officer was not bound to produce them. 2 T. R. 616

INSURANCE.

I. *Abandonment.*

1. Owners of ships are not entitled to abandon, unless at some period of the voyage there has been a total loss; and where the jury have found only an average loss, occasioned by the perils of the sea, the court are precluded from saying there has been a total loss. *Cazalet & al.* v. *St. Barbe*. 1 T. R. 187

2. Where the *voyage* is lost, but the property is saved, the owners may abandon. *Mitchell* v. *Edie*. 1 T. R. 608

2. When the assured receive intelligence of such a loss as entitles them to abandon, they must make their election in the first instance; and if they abandon, they must give the underwriters notice in a reasonable time; otherwise they wave their right to abandon, and can only recover for an average loss. 1 T. R. 608

4. But if the insured, hearing that his ship is much disabled, and has put into port to repair, express his desire to the underwriters to abandon, and be dissuaded from it by them, and they order the repairs to be made, they are liable to the owner for all the subsequent damage occasioned by that refusal, though it should amount to the whole sum insured. *Da Costa* v. *Newnham*. 2 T. R. 407

5. Where a vessel sailing with corn from Waterford to Liverpool, under a policy with a mem. to be free from all but general average, was stranded near Waterford on the 28th of January, and continued under water at times for near a month, during which time the assured at low water was employed in saving the cargo for their own benefit, and the whole of the cargo being damaged but some recovered, and no notice of abandonment was given to

the underwriters in London, till the 18th of February, the Court of K. B. held that this was not notice in such a reasonable time as to entitle the insured to abandon as for a total loss.

Anderson v. *Royal Exch. Ass. Co.* 7 E. R. 38

6. On a wagering policy the assured cannot abandon.

Kulen Kemp v. *Vigne.* 1 T.R. 304

7. Where an act or barratry has been committed during the voyage, as by smuggling, which subjects the vessel to forfeiture, *qu.* How far the assured may abandon?

Locker & al. v. *Offley.* 1 T. R. 252

8. While a ship was forcibly detained in a foreign port, the owner abandoned first the ship, and then the freight, to the different sets of underwriters thereon, who paid as for a total loss; after which the ship was liberated, re-shipped her cargo which had been taken out, and returned home, *earning freight*, which was received by the assured. Held that each set of underwriters were respectively entitled to the benefit of salvage, and to receive, subject to the deductions of the necessary expenses of saving it applicable to each underwriter, the net salvage which remained.

Sharp v. *Gladstone.* 7 E. R. 24

9. A ship insured from *Jamaica* to *Liverpool*, was captured in the course of her voyage, and recaptured in a few days: and the assured having received intelligence of the capture, but not of the recapture, gave notice of abandonment: and soon after receiving intelligence of the recapture, and that the ship was safe in the possession of the recaptors, in a port in *Ireland*, but without any further knowledge of her state and condition, he persisted in his notice of abandonment: but the ship was afterwards restored to his possession without damage, and arrived at Liverpool, and earned her freight; the salvage and charges of the recapture amounting only to 15*l.* 4*s.* 8*d.* per cent.: the Court of K. B. held that he was not entitled to abandon; it appearing in the result that at the time when the notice of abandonment was given, it was in fact only a partial and not a total loss, as the assured supposed; and there being no subsequent circumstances, such as the loss of voyage, high salvage, &c. to continue it a total loss. And *quere*, whether in any case, if that, which in its inception was a temporary total loss, turn out by subsequent events to be only a partial loss, before any action brought, the assured be entitled to insist on his notice to abandon given during the existence of such temporary total loss.

Bainbridge v. *Neilson.* 10 E.R. 329

The like point was ruled on the freight policy, on which there was a partial loss of 13*l.* 11*s.* 5*d.* per cent.

10 E. R. 329

But at any rate if the underwriters accept the offer, of abandonment, made upon such temporary total loss, both parties are bound by it. 10 E.R. 329

10. A foreigner insuring in this country his ships or goods on a voyage, is not entitled to abandon on an embargo laid on the property in the ports of his own country, as his assent is virtually implied to every act of his own government, and makes such embargo his own voluntary act. And goods having been consigned by such foreigner on his own account and risk to *British* merchants here, who in consequence of such consignment made advances to the foreigner, and made insurance upon the goods on his account, debiting him with the premiums; and the goods were afterwards abandoned in consequence of such embargo: the Court of K. B. held that as the foreigner could not recover against the underwriters, his consignees could not recover their advances under a policy made for the benefit of the foreigner, though made in their names, as interest might appear; however they might have insured their separate interests by a policy made on their own account.

Conway & al. v. *Grey.* 10 E. R. 536

See also *Maury* v. *Shedden*, *ib.* p. 540, where the point was similar.

See also *Conway* v. *Forbes*, *ib.* p. 539. a similar action on another policy of insurance on cotton on board the same ship.

11. Goods insured upon a valued policy, having been seized, confiscated, and sold, by order of the enemy's government, on their own account, but the necessary documents to verify the loss not having arrived here, the underwriters, on application to pay their subscriptions agreed to adjust and pay immediately 50*l.* per cent. on account, but no abandonment was made by the assured; and in the meantime the foreign

consignees of the goods, in consequence of remonstrances to the enemy's government, obtained a restoration of half the proceeds of the goods which had been so seized and sold, which half amounted to more than the whole sum at which they were valued in the policy: yet held that the underwriters were not entitled to recover back the 50*l.* per cent. they had paid on account; the assured having in fact sustained a loss of half his goods, for which he was no more than indemnified by the 50*l.* per cent. he had received; and there having been no abandonment to the underwriters; and the superior value of the other half of the proceeds arising from the benefit of the market, in which the underwriters had no concern.

Tunno v. *Edwards*. 12 E. R. 488

II. *Agent; of Insurances by.*

1. If an agent effect a policy without inserting his name *as agent*, such policy is void by stat. 25. *G.* 3. *c.* 44.

Pray v. *Edie*. 1 T. R. 313

2. Whether an agent, effecting a policy for his principal residing abroad, must not reside in *England*. *Qu.* 1 T. R. 313 [This stat. 25 *G.* 3. *c.* 44. was repealed by stat. 28 *G.* 3. *c.* 56, which see.]

3. It is a sufficient compliance with this latter statute if the name of the broker effecting the insurance be inserted in the policy as agent.

Bell & al. v. *Gilson*. 1 B. & P. 345

4. If a merchant abroad, interested in goods and the freight of a cargo, mortgage them to his correspondent in *England* for payment of money at a certain day, and by letter inclosing the bills of lading direct him to insure, the latter, having accepted the bills of lading, will be liable to an action for not insuring, notwithstanding the mortgage was become absolute before the order was received.

Smith v. *Lascelles*. 2 T. R. 187

5. A merchant abroad having effects in the hands of his correspondent in *England* has a right to call upon him to make an insurance for him. *ib.*

6. If a merchant in *England* has been used to procure insurances for his correspondent abroad in the usual course of trade, the latter has a right to expect compliance with an order for insurance from the former, although he has no effects in his correspondent's hands, unless some previous notice be given to the contrary. *ib.*

7. If a merchant abroad send bills of lading to his correspondent here, and at the same time give directions for procuring insurance, the latter cannot accept the bills of lading without obeying the orders to insure. *ib.*

8. Where a merchant here had accepted an order for insurance, and limited the broker to too small a premium, in consequence of which no insurance could be procured, he was held liable to make good the loss to his correspondent. *Wallace* v. *Tellfair, Sitt. after T. at G. H.* 1786. 2 T. R. 188, *n.*

9. If a merchant residing in *London*, who has received an order for insurance from his correspondent, does what is usual to get the insurance effected, as if he applies to *Lloyd's* without effect, he is not bound to send to another place for that purpose; though it may be doubtful whether he ought not to apply to the public insurance offices in *London*, if it be customary to make application to them in such cases.

Smith v. *Cologan*. 2 T. R. 188, *n.*

10. But if the merchant in such case do not apply to the public offices, but send to *Newcastle* or any other port, and do the best he can, he is not answerable for the subsequent ill conduct of the insurer; and more especially if the principal adopt his acts even for a moment. 2 T. R. 188, *n.*

11. Where an *English* subject in time of war, who had received orders to effect an insurance for a neutral foreigner, opened the policy with his usual broker in his own name, but informing him at the same time that the property was *neutral*; this is a sufficient indication to the broker that the party acted as *agent*, and not on his own account: and therefore the broker has no lien on the policy so effected for his general balance against such agent, as between such broker and the principal.

Means v. *Henderson*. 1 E. R. 335

(Add see LIEN 10.)

III. *Barratry.*

1. Barratry can only be committed by the master or mariners *against the owner of the ship*, and without his consent. *Nutt* v. *Bourdieu*. 1 T. R. 323

2. The owner of the ship cannot commit barratry; he may make himself liable to the owner of the goods by his fraudulent conduct, but not as for barratry. 1 T. R. 323

3. Therefore where any of the owners of

the ship are concerned in the fraud of the master or mariners, it is no barratry in them, and the underwriter is not liable. 1 T. R. 323

4. A deviation of a vessel from the voyage insured, through the ignorance of the captain or from any other motive not fraudulent, though it avoids the policy, does not constitute an act of barratry. *Phyn.* v. *R. Ex. Assur.* 7 T. R. 505

5. If a ship be insured by the terms of the policy *in any lawful trade*, and the barratry of the master be mentioned as one of the risks to be borne by the underwriters, they are liable for a loss which happens by the barratry of the master by smuggling.

Havelock v. *Hancill.* 3 T. R. 277

6. The stipulation respecting the employment of the ship in a *lawful trade*, must be applied to the *trade in which the owners employ her.* 3 T. R. 277

7. In an act by the assured of goods against the underwriters for a loss by the barratry of the master, proof that the person described in the policy as *master*, and who was treated with and acted as such, carried the ship out of her course for fraudulent purposes of his own, is *primâ facie* sufficient to entitle the plaintiff to recover, without shewing negatively that he was not the owner, or affirmatively that any other person was.

Ross v. *Hunter.* 4 T. R. 33

8. And where the voyage insured was from *Jamaica* to *New Orleans*, which lies up the river *Mississippi*, and the captain proceeded on his voyage as far as the mouth of that river, and then dropped anchor, and went up the river in his boat for a fraudulent purpose of his own, it was held that the dropping of his anchor with such fraudulent intent was an act of barratry, and not merely a deviation. 4 T. R. 33

9. Barratry is any fraudulent or criminal conduct against the owners of ships or goods by the master or mariners, in breach of the trust reposed in them, and to the injury of the owners; although it may not be done with intent to injure them, or to benefit at their expense the master or mariners. And, therefore, where a master had general instructions to make the best purchases with dispatch; this would not warrant him in going into an enemy's settlement to trade (which was permitted by the enemy) though his cargo could be more speedily and cheaply completed there; but such act, in consequence of which the ship was seized and confiscated, is barratrous.

Earl v. *Rowcroft.* 8 E. R. 126

10. A loss by barratry is well alleged, though the proof is, that it happened by the act of an enemy and by barratry jointly.

Toulmin v. *Anderson.* 1 W. P. T. 227

IV. *Deviation.*

1. If a ship be driven out of her loading port, and obliged to go into another port, and after fruitless attempts to get back again, she does the best she can to get from thence to the place of her destination, that will not be considered as a deviation. 1 T. R. 22

2. Neither does it vacate the policy if such ship complete her loading at the port into which she is so driven. In the principal case, however, there was a custom to warrant this. 1 T. R. 22

3. Insurance on the ship *Friendship* "at and from *S. Kitt's* to *London*, warranted to sail with convoy on or before 1st of *August*." The ship, after taking in part of her cargo at *S. Kitt's* was driven out of her port and obliged to go into *St. Eustatia.* When she was there she made several efforts to get back to *St. Kitt's* to finish her loading, but not succeeding, was sold by the plaintiff to Mr. *Ross* of *St. Eustatia*, and completed her loading there; and afterwards sailed on the 1st of *August* from thence with convoy for *London*, but was lost in the course of the voyage. It appeared that *St. Eustatia* is in the direct road to *London* from *St. Kitt's*, and that the convoy from *St. Kitt's* always looked into *St. Eustatia* to take up any ships that might be there; that if the ship had sailed immediately from *St. Kitt's* she must have gone by *Eustatia*, but would not have stopped there; and it was also proved to be the custom, that where a captain had not taken in his full cargo at *St. Kitt's*, he should take in the rest at *St. Eustatia.* The court, under these circumstances, held the going to *St. Eustatia*, and the finishing the loading there, not to be a deviation so as to discharge the policy.

Delancy v. *Stoddart.* 1 T. R. 22

4. If a ship insured for a certain time sail before the time on a different voyage from that insured, the assured

cannot recover though she afterwards get into the course of the voyage described in the policy, and is lost after the day upon which the policy was to have attached.

Way v. Modigliani. 2 T. R. 30

5. If the voyage described in the policy be "from *A.* to *B.* and *C.*," and the ship go to *C.* before *B.*, (though *C.* be nearer to *A.* than *B.* is), it is a deviation, if it be not the regular and settled course of the voyage to go to *C.* first. *Beatson* v. *Haworth.* 6 T. R. 531

6. Whether such a regular and settled course of voyage will control such a policy? *Qu.* 6 T. R. 531

7. When a ship is insured from one port to another, the policy does not attach, unless she sail *on the voyage insured.* 2 T. R. 30

8. If the ship actually sail on the voyage insured, an intention to deviate, not carried into effect, does not vitiate the policy. 2 H. B. 343

9. Insurance on a voyage from *C.* to *D.*, on a representation that the ship was first to sail from *A.* to *B.*, and from *B.* to *C.*; the voyage from *A.* to *B.* was performed, but that from *B.* to *C.* being unavoidably prevented, the ship returned to *A.*, from thence proceeded immediately to *C.*, and in performing the voyage from *C.* to *D.* was lost; and this was held a good commencement of the voyage insured.

Driscol v. *Passmore.* 1 B. & P. 200

10. In another case on an insurance on the *round* voyage (stated in the preceding case), where, after the ship had returned to *A.*, the captain wrote from thence to his broker in *London*, requesting him to obtain the opinion of the underwriters as to his proceeding directly to *C.* if the charterer should insist upon it, and received for answer, the broker's opinion, that the policy was at an end. At the instance of the charterer the captain proceeded to *C.*, and on his return from thence to *A.* the ship was captured: the Court of *C. P.* held that the voyage insured was never abandoned.

Driscol v. *Bovil.* 1 B. & P. 313

11. Policy on goods on board a particular ship from *A.* to *B.* "against sea risk and fire only;" in the course of the voyage from *A.* to *B.* the ship was carried out of the course of the voyage by a king's ship; but being afterwards released, she proceeded on the voyage insured, and while so proceeding, the goods insured sustained sea damage: held, that the underwriters were liable for this loss.

Scott v. *Thompson.* N. R. 181

12. Under a policy of insurance on goods from *A.* to *B.*, *C.*, and *D.*, the risk attached, where the ship, which was captured before the dividing point, sailed with intention to proceed directly to *D.* without first visiting the intermediate places. Though under such a policy, if a ship mean to go to more than one of the places so named, she must visit them in the order in which they stand in the policy.

Marsden v. *Reid.* 3 E. R. 572

13. In an action on a policy of Insurance on a ship licenced by the *East India* Company to proceed for one voyage from *England* to the *Cape*; from thence to the *Pacific Ocean* and *North West Coast* of *America*, and there to sell the cargo from *London*, and trade and traffic and procure and afterwards sell the produce or manufacture of those parts, and to proceed from thence to *Japan*, *Korrea*, and *Canton*, and there to dispose of the cargo procured on the *North West Coast* of *America*, and then return to *England*, which licence was to be in force for three years; the Court held, that a ship which was lost in the *Pacific Ocean* after having abandoned all intention of proceeding to *Canton* was protected by the licence.

Norville v. *St. Barbe.* 2 N. R. 434

14. If a ship has liberty to touch at a port, it is no deviation to take in merchandize during her allowed stay there, if she does not by means thereof exceed the period allowed for her remaining there.

Urquhart v. *Barnard.* 1 W. P. T. 450

15. If liberty be given to touch at a port, the contract not defining for what purpose, but a communication having been made to the underwriter, that the ship was to touch for a purpose of trade, it shall be intended as a liberty to touch for that purpose. 1 W. P. T. 450

16. Upon an insurance on an *East India* voyage, the underwriters are bound to know the course of the *East India* company's charter-parties and trade, and that the ship's destination is liable to be changed after the policy is effected. 1 W. P. T. 463

17. If the *East India* Company permit the voyage of a chartered ship to be altered, though it is at the request and

partly for the benefit of the assured, the altered voyage continues protected by the policy. 1 W. P. T. 463

18. It is not an implied condition in a common marine policy on ship and freight, that the ship shall not trade in the course of her voyage, if that may be done without deviation or delay otherwise increasing the risk of the insurers: and therefore where a ship was compelled in the course of her voyage to enter a port for the purpose of obtaining a necessary stock of provisions, which she could not obtain before in the usual course, by reason of a scarcity at her lading ports; and during her justifiable stay in the port so entered for that purpose she took on board bullion there on freight, which the jury found did not occasion any delay in the voyage; it was held not to avoid the policy. *Raine* v. *Bell.* 9 E. R. 195

20. It is not sufficient to sail with a convoy appointed for another voyage, though it may be bound upon the same course for great part of the way. 1 W.P.T.249

19. The sailing with convoy required by the stat. 43 *Geo.* 3. *c.* 57. is a sailing with convoy for the voyage.

Cohen v. *Hinckley.* 1 W.P.T. 249

21. A ship cannot legally sail from port to port without convoy, unless she is bound from port to port. 1 W.P.T.249

22. A ship from *Stockholm* to *New-York* was by the course of the voyage to touch at *Elsineur* for convoy, and to pay the *Sound* dues: and the owner of sheep on board took in a short stock of provender for them at *Stockholm*, and laid in the rest at *Elsineur* before the *Sound* dues could be paid: the Court of K. B. held that the voyage not being thereby delayed; though the occurrence was foreseen and intended; the policy was not avoided, but the underwriters were liable for a subsequent loss of the ship by the perils of the sea.

Cormack v. *Gladstone.* 11 E.R. 347

23. An Insurance on goods shipped on a certain voyage is not avoided by the ship while lying in a roadsted at anchor under orders of the convoy, and after a signal to prepare for sailing and and about the time when the signal for weighing was made, taking in other goods on board: by which it was found that no delay was occasioned and that the ship got under weigh as soon as she could otherwise have done.

Laroche & al. v. *Oswin.* 12 E. R. 131

24. A ship was insured from *London* to any port or ports in the River Plate, until her arrival at her last port of discharge in that river; and the master intending to discharge her cargo at *Buenos Ayres* passed *Maldonado*, but hearing that *Buenos Ayres* was then in the hands of the enemy, he went to *Monte Video* with intent to make a complete discharge there, if the market were favourable; but after discharging a part, and not finding the market there so favourable as he expected, he had not abandoned his original intention of going to *Buenos Ayres* if it should afterwards be practicable; but while he was still discharging part of his cargo at *Monte Video*, a loss happened by a peril of the sea: the Court of K. B. held, that as *Buenos Ayres* to which other port only in the Plate he had contemplated to go, was at the time of his arrival in the Plate (and in fact continued up to the time of the loss) in the hands of the enemy, so that he could not legally go there, *Monte Video* must be taken to be the ship's last port of discharge, and that on her arrival there the policy was discharged.

Brown & al. v. *Vigne.* 12 E. R. 283

V. *Fraud, Concealment, or Omission.*

1. The assured cannot recover on a policy of insurance, unless they make a full disclosure of all the circumstances of the intended voyage, even with respect to the tract the ship intends to take. *Middlewood* v. *Blakes.* 7T.R.162

2. Any person acting by the orders of the insured, or his agent, and who is anywise instrumental in procuring the insurance, is bound to disclose all he knows to the underwriter before the policy is effected; and where any misrepresentation arise from his fraud or negligence, even without the privity of his employer, the policy is void.

Fitzherbert v. *Mather.* 1 T. R. 12

3. Where an insurance was ordered by the principal to be made as soon as a letter was received from his agent; and that agent, when he wrote the letter, knew nothing of the loss of the vessel, but had an opportunity by the course of the post of contradicting the contents of it, and transmitting intelligence of the loss before the insurance was effected, and neglected to do so; the policy is void on the ground of misrepresentation, though the assured himself knew nothing of the loss.

1 T. R. 12

4. The assured cannot recover on a po-

licy of assurance, unless they equip the ship with every thing necessary to her navigation during the voyage; and therefore they cannot recover if there be no pilot on board.

Law v. *Hollingsworth*. 7 T. R. 160

5. Whether it be necessary, to the right of the assured to recover, that in navigating up the *Thames*, there should be a pilot on board qualified according to the directions of stat. 5. *G.* 2. *c.* 20.? *Qu.* 7 T. R. 160

6. By stat. 31 *G.* 3. *c.* 54. § 7. for regulating the *African* slave-trade it is necessary that the certificate of the captain's having served as that act requires should be attested by the owner or owners of the ship or ships in which the service was performed: and the assured cannot recover on a policy on a ship whose captain has not such a certificate. *Farmer* v. *Legg*. 7 T.R. 186

7. If a policy be effected on a foreign built ship *British* owned (which not being required to be registered, may sail without convoy), it is not incumbent on the assured to communicate to the underwriter, at the time of making the policy, the circumstance of her being foreign built.

Long v. *Duff*. 2 B. & P. 209

8. As an assured impliedly warrants the ship insured to be seaworthy, whatever forms an ingredient in seaworthiness is not necessary to be disclosed by the assured to the underwriters in the first instance, unless information upon the subject be particularly called for, and then the assured must disclose truly what he knows in the respect required; therefore where the assured of a ship had received a letter from his captain informing him that he had been obliged to have a survey on the ship at *Trinidad on account of her bad character;* but the survey which accompanied the letter gave the ship a good character; held that the non-disclosure of such letter and survey to the underwriters did not vacate the policy; though it appeared in evidence that such circumstance, if known, would have enhanced the premium of insurance. *Hayward & al.* v. *Rodgers*. 4 E. R. 590

9. Action on a policy of goods from *Borderygge* to *London*, effected by the consignees on the 13th *December*, without communicating a letter received by them the day before, but dated the 30th of *November*, informing them that the captain would sail the next day, and directing them, if he should not be arrived, to effect the insurance as low as possible; held a material concealment, though the ship did not in fact set sail until the 24th *December*. *Willes* v. *Glover*. N. R. 14

10. In effecting a policy on the 8th of *January* at *Whitehaven*, on a ship at and from *Barbadoes* to *Liverpool*, a broker's letter was produced, stating that the ship insured was not coppered, but a slow sailer; was expected to have sailed on 28th *November;* and that the *Barton*, a coppered vessel, and very fleet, which had sailed the 24th from *Barbadoes*. had arrived on the 5th of *January;* but no notice was taken of the *Agreeable*, another coppered and fleet vessel, which sailed 29th *November*, having also arrived on the same day as the *Barton*. After verdict for the plaintiff the court refused to grant a new trial on the ground of concealment. *Littledale* v. *Dixon*. N.R. 151

11. A ship on an African voyage, the common duration of which is several months, and sometimes extends to a twelvemonth or more, arrived on the coast in *August*, 1799; and in *February*, 1800, her then commander wrote a letter to his owners, mentioning an attack on her at another place on the coast by the natives, who killed the captain and several of the crew, and wounded others; by means of which and of a fever, the crew were reduced to five, and all those sickly, and not a man to be procured at hand: that they had been plundered of their clothes, &c. and their cabin stores were exhausted, and they did not know what to do. A second letter, dated 21st *April*, 1800, from *Gaboon River*, mentioned their arrival there *on the 24th March:* that *the natives finding them weakly handed, and their goods taken from them, did as they pleased:* that they had *then* nine men on board; *but* their provisions run very low: that he had mentioned certain parts of the cargo *in his last letter*, and expected to ship the rest, and to sail at the end of the next *month*. An Insurance was effected in *September*, 1800, *on the production of the last letter only*, "*at* and from the ship's arrival at her first place of trade *on the coast of* Africa," &c. The Court of K. B. held it sufficient that the last letter truly stated the *then* condition and circumstances of the ship; which, though better than when the first letter was written, was

yet *no fraudulent concealment of the former circumstances;* the secondletter, both in its terms and contents, referring to a *former* letter; which it was the fault of the underwriters not to have called for, if they thought that a particular knowledge of former difficulties, in part subdued, and to the extent truly stated in the second letter, would have varied the risk: and when the underwriters, cognizant as they must be presumed to be of the common duration of such a voyage, could not fairly collect from the contents of the second letter that the *first arrival* of the ship *on the coast* was only *on the 24th of* March, when she was stated to have arrived *in Gaboon River*, and to have had much of her homeward bound cargo on board on the 21st of *April*, and was expected to sail with the remainder by the end of *May*.

Freeland & al. v. *Glover*. 7 E. R. 457

12. A representation to the underwriters at the time of effecting a policy by the owner of *goods* on board a ship, as to the time of her sailing, being made *bonâ fide* upon probable expectation, does not conclude him.

Bowden v. *Vaughan*. 10 E. R. 415

13. Insurance on provisions "from *London* to *Helsingberg*, the *Sound*, *Copenhagen*, all or either;" which provisions were intended for the supply of the *British* fleet and army then engaged in the expedition against *Copenhagen* (of which they were then in possession, but were about to evacuate it), and were consigned to merchants there, and at *Elsineur;* held good; although in consequence of expected hostilities with *Denmark*, an order of the King in Council had issued, prohibiting the clearing out of any *British* ships to a *Danish* port, and a clearance was in consequence taken out for *Helsingberg*, a *Swedish* and neutral port in the neighbourhood of *Denmark* the adventure being legal, and not contravening the spirit of the order of council. *Atkinson* v. *Abbott*. 11 E. R. 135

14. Where a party insured to a certain amount, in one policy, goods to be thereafter specified; and in the specification afterwards made by him were included some goods, the exportation of which was prohibited under pain of forfeiting the goods themselves and treble their value, and which also induced a forfeiture of the ship; the policy was held to be avoided in toto.

Parkin v. *Dick*. 11 E. R. 502

VI. *Loss; what shall be considered within the Policy.*

1. The insured cannot recover upon the policy, unless the loss be a *direct* and *immediate* consequence of the peril insured; so that slaves who die by any other means than by wounds or bruises received in the very act of quelling a mutiny, are not within that provision of an *African* policy, which insures against loss by mutiny. *Jones* v. *Schmoll* H. 26. G. 3. 1 T. R. 130, *n.*

2. Upon an insurance on slaves against perils of the sea, their death by failure of sufficient and suitable provision occasioned by extraordinary delay in the voyage from bad weather, is not a loss within the policy, but a loss by natural death, which cannot be insured against since stats. 30 G. 3. c. 33. § 8., and 34 G. 3. c. 80.

Tatham v. *Hodgson*. 6 T. R. 656

3. The underwriter is in no instance liable for any loss which happens after the vessel has been moored 24 hours in safety; although such loss should arise from some previous damage sustained during the voyage. 1 T. R. 261

4. A ship being insured for a voyage, the underwriter is not liable for any loss arising from seizure, *after she has been 24 hours in port;* though such seizure was in consequence of an act of barratry, committed by the master, by smuggling *during the voyage*

Lockyer v. *Offley*. 1 T. R. 252

5. Insurance on goods from *A.* to *B.* "until they should be there discharged and safely landed;" on their arrival at *B.* the merchant to whom the goods belonged employed and paid a public lighter to land them, and the goods being damaged in the lighter without negligence, the underwriters were held liable for the loss. *Hurry* v. *The Royal Exchange Assurance Company*. 2 B. & P. 430

6. *S. P. Rucker* v. *London Assurance Company, G. H.* 1784, *cor. Buller* J. 2 B. & P. 432, *n.*

7. Insurance on goods on board a *Spanish* ship from *Nassau* to *Campeachy* to continue on the goods till discharged and safely landed. The ship having a licence from the *British* government at *Nassau* sailed from *Campeachy*, and having arrived off that port, made signals for launches to come out, into which the goods were put for the purpose of being run ashore. In this situation the goods were seized by two *Spa-*

nish government brigs, it being contrary to the *Spanish* laws to import *British* goods into the *Spanish* main. It seems that the goods were protected by the policy while on board the launches, such being the usual method of carrying on that trade.

Matthie v. *Potts.* 3 B. & P. 23 (And see 3 B. & P. 23. tit. PLEADING II.)

8. Action on a policy on goods, "until the cargo should be discharged, and safely landed;" on the arrival of the ship the goods insured were put on board a lighter hired in the usual way, and brought to the plaintiff's wharf in the evening, but not landed on account of the rough weather; the plaintiff then undertook to see to the landing himself; but in the night the lighter was by an unavoidable accident sunk, and the goods lost; held that the underwriters were discharged.

Strong v. *Natully.* N. R. 16

9. Policy on freight valued at 500*l.* on a voyage at and from *Demarara*, *Berbice*, and the *Windward* and *Leeward* islands to *London;* the ship being at *Demarara*, an agreement was entered into by the master with a house there, for a freight from *Berbice* to *London*, the cargo to be put on board at *Berbice*, and the ship to take a cargo of bricks and planks from *Demarara* to *Berbice*, and deliver them there. While proceeding from *Demarara* to *Berbice* with the bricks and planks on board, she met with an accident, and in consequence never earned her freight; held, that it was not a loss within the policy. *Sellar* v. *M'Vicar.* 1 N. R. 23

10. Where a ship was insured for six months; and three days before the expiration of the time she received her death's wound, but was kept afloat by pumping till three days after the time the underwriter was held discharged.

Meretony v. *Dunlop*, *E.* 23. *G.* 3. *cited per Cur.* 1 T. R. 261

11. Money having been expended in reclaiming a cargo on board a ship captured, was insured by the owners upon the event of the ship's arrival at *Marseilles;* the ship being captured, and restored upon appeal, relinquished her voyage and was afterwards lost; pending the appeal, the goods were ordered to be sold, and the expenses of the appeal were afterwards defrayed therewith; an averment of a loss by *capture* was held bad, because the ship might, notwithstanding the capture, have afterwards arrived at *Marseilles.*

Kulen Kemp v. *Vigne.* 1 T. R. 304

12. Where repairs are ordered by the underwriters, for the payment of which a bottomry bond is given, and they refuse to pay it on the arrival of the ship, in consequence of which she is sold, they are liable for all the damage which shall accrue to the owner in consequence of that refusal.

De Costa v. *Newnham.* 2 T. R. 407

13. Where a ship has been repaired, the underwriters are not entitled to the usual deduction of one third, new for old, unless the ship has been put into the free possession of the owner again. 2 T. R. 407

14. The assured upon a valued policy on freight is entitled to recover the whole amount, though part of the goods only were on board at the time the ship was lost, the rest being ready to be shipped.

Montgomery v. *Eggington.* 3T.R.362

5. Two policies of insurance for different sums are effected on goods on board any *ship or ships* on a voyage from *A.* and *B.;* goods nearly amounting to the value of both policies are put, in different proportions, on board two ships which sail on the voyage, one of which is lost, but the other arrives in safety at *B.* The insured may apply either policy to the ship which is lost. *Henchman* v. *Offley*, *B. R. M.* 23 *G.* 3. 2 H. B. 345, *n.*

16. A policy of insurance is effected on specific goods on board a certain ship named, on a voyage *at and from A.* to *B.*, and another policy is also made on any kind of goods as interest should appear, *on board ship or ships*, on the same voyage, warranted to sail within a limited time; but no circumstance relating to the first policy is communicated to the underwriters of the second, nor do they know that the first was made. Goods, to the full amount of the sum insured in the second policy, are put on board a ship (not the ship named), which sails within a limited time from *A. with an intention to touch at C. in her course to B., but is lost before she arrives at the deviating point.* The underwriters of the second policy are answerable for the loss. *Kewley* v. *Ryan.* 2H.B.343

17. *Provisions* sent out in a ship for the use of the crew are protected by a policy *on the ship and furniture.*

Brough v. *Whitmore.* 4 T. R. 206

18. Seamen's wages and provisions are not covered by an insurance on the body of the ship. *Robertson* v. *Ewer*, *H.* 26 *G.* 3. 1 T. R. 127, 132, *n.*

19. Where by a policy of insurance ship and goods were insured "at and from all and every port, &c. *on the coast of* Brazil, and *after the* 17*th* September to the *Cape of Good Hope, beginning* the adventure upon the *goods from the loading thereof aboard the said* ship at all or every port, &c. on the coast of *Brazil*, and *from the* 17*th of* September, 1800; and *upon the ship in the same manner*," and with liberty to sail to, &c. any places backwards or forwards under the *Portuguese* government, &c. at a premium of four guineas *per cent.*, to return 3*l.* 10*s.* should the ship have arrived, or the risk have otherwise ceased on or before the 17th of *September;* held, that the policy only attached on the homeward-bound cargo laden on board *at the coast of* Brazil, and did not cover a cargo originally taken in *at the* Cape of Good Hope, and which continued on board after the 17th of *September*, while the ship was on the coast of Brazil, and after she left it on her return to the Cape. Neither did the policy cover the ship itself, which was insured *in the same manner* as the goods.

Robertson v. *French.* 4 E. R. 130

20. Where a ship was chartered to take a cargo of lead from *London to St. Petersburgh*, and there immediately receive a return cargo from the freighter's agent, and bring it to *London;* with a *proviso*, that if political circumstances should prevent a return cargo from being laden, the master, after waiting at *St. Petersburgh* forty running days without the outward cargo being unladen, and, consequently, without the return cargo being laden, should be at liberty to return to *London*, or any port in *England;* the ship not having been permitted to unlade at *St. Petersburgh* by the *Russian* government, the master, after waiting there the forty running days, laded a return cargo for his own benefit upon the outward cargo, both of which he brought home, and earned new freight on the homeward cargo; which freight was adjudged to him by the judgment of the Court of C. B. in an action between him and the freighters, over and above the dead freight stipulated to be paid by the charter-party: the Court of K. B. held that the freighters were entitled to recover the whole of such dead freight from the underwriters upon a policy of insurance, whereby they agreed to pay a loss in case the master should not be allowed by the *Russian* government to unlade the outward cargo at *St. Petersburgh;* the vessel having sailed chartered by the freighters on a voyage from *London* to *St. Petersburgh*, and back: and that the underwriters were not entitled to deduct such return freight earned by the master on his own account, and adjudged to him by C. B.; they having agreed with the assured pending this action and pending the action in C. B., that in case the plaintiffs (to whom they had paid a per centage loss) should not be able to obtain so large an allowance as the full return freight paid to the master by reason of any demurrages or expenses being allowed against the said freight, the difference should be paid by the underwriters by a further per centage, whether the same were settled between the plaintiffs and the ship by arbitration or by legal decision. *Puller & al.* v. *Halliday.* 12 E. R. 494

21. An *American* ship, insured from *New York* to *London*, warranted free from *American* condemnation, having, for the purpose of eluding her national embargo, slipt away in the night, was by force of the ice, wind, and tide, driven on shore, where she sustained only partial damage, but was seized the next day, and afterwards with great difficulty and expense, got off and finally condemned by the *American* government for breach of the embargo: held as there was ultimately a total loss by a peril excepted out of the policy, the assured could neither recover for a total loss, nor for any previous partial loss arising from the stranding, &c. which in the event became wholly immaterial to the assured.

Livie v. *Janson.* 12 E. R. 648

22. A policy upon a homeward voyage from *India*, upon goods at and from a foreign port of lading, until the ship's arrival in *London*, beginning the adventure upon the *said* goods from the *lading* thereof at the foreign port, and so should continue upon the goods, until the same should be discharged; was held to attach only on the particular cargo taken at the first port of lading. *Grant* v. *Paxton.* 1 W. P. T. 463

23. Though the insurance was, to all or any ports and places whatsoever beyond the *Cape of Good Hope*, in port, and at sea, in all places, at all times, and in all services, with liberty to proceed to, touch, and stay at any port or places whatsoever for any purpose whatsoever. 1 W. P. T. 463, *ib.*

24. In moving a ship from one part of an harbour to another it became necessary to send two of the crew on shore to make fast a new line and cast off the rope by which the ship was made fast; those two men being immediately impressed and carried away, and not being allowed by the press-gang to cast off the rope in question, the ship in consequence thereof went ashore: the Court of C. P. held this to be a loss by perils of the sea within the policy.

Hodgson v. *Malcolm.* 2 N. R. 336

25. Freighters chartered a foreign ship to take a cargo from *London* to *St. Petersburgh*, and to lade a cargo there, and immediately return to *London*, paying so much freight per ton: and it was covenanted that if political or other circumstances should prevent the shipping a return cargo, *or discharging the outward cargo*, the freighters might detain the ship at *St. Petersburgh* for forty running days; and if that time elapsed without the outward cargo being delivered, and consequently without the return cargo being put on board, *the master should be at liberty to return to* London, *and the freighters should pay him* 2500*l. immediately upon the arrival* of the ship *at London*. The freighters then procured a policy of Insurance, whereby the underwriters agreed *to pay a total loss in case the ship was not allowed by the* Russian *Government to load a cargo at* St. Petersburgh *on the chartered voyage*. In fact the *Russian* government, when the ship arrived at *St. Petersburgh*, *presuming that the outward cargo was* British, *refused permission to unload her*, and consequently she could not take in a *Russian* cargo: on which the master, judging for the best, proceeded immediately to *Stockholm*, where, after disposing of the outward cargo to disadvantage, he brought home a *Swedish* cargo to *London*, and earned freight thereon. The Court of K. B. held,

1st, That the Insurance was legal in the terms of it.

2dly, That the refusal of the *Russian* government to permit the ship to unload her outward cargo, was, in effect, and within the meaning of the contracting parties, a refusal to allow her to load a cargo at *St. Petersburgh*; and, consequently, that a total loss within the policy was incurred.

3dly, That the proceeding directly from *St. Petersburgh* to *London* was not a condition precedent to the master's right to recover from the freighters the dead freight of 2,500*l.*, but that he was entitled to the same notwithstanding the intermediate voyage to *Stockholm*, under the circumstances; and consequently that the freighters were entitled to recover the same from the underwriters. But,

4thly, That as the freighters would be entitled to deduct from the sum payable to the master for dead freight the amount of the freight received by him on the cargo from *Stockholm* to *London*; though such intermediate voyage were not originally contemplated by the contracting parties, but was undertaken upon the emergency; therefore the underwriters were entitled to make the same deduction from the total loss stipulated for by the policy in the event which had happened; every contract of Insurance being in its nature a contract of indemnity.

Puller v. *Staniforth.* 11 E. R. 232

26. A policy of Insurance from *Bristol* to *Monte Video*, or other port in the river *Plate*, where the ship, after arriving off *Maldonado* at the mouth of the *Plate*, was immediately ordered off by the *British* commander there (the enemy having before gotten possession of every other port in the river); will not cover a loss which happened to the goods insured by a peril of the sea after the ship's departure from thence in her way to *Rio Janeiro*, which was the nearest friendly port, and to which she was under a necessity of going for water and repairs.

Parkin v. *Tunno.* 11 E. R. 22

VII. *Loss: total.*

1. The nature of a policy is an insurance *on the ship for the voyage*. If either the *ship*, or the *voyage*, be lost, it is a total loss. 1 T. R. 191

2. If the ship arrive safe, the circumstance of her not being worth repairing will not make it a total loss. 1 T. R. 187

3. On an insurance on ship and goods valued at so much, on a voyage to *Africa* and the *West Indies*, the assured is entitled to recover the whole sum on a total loss which happened in the latest period of the voyage; although a considerable part of the estimated value consisted originally in stores and provisions for the purchase and sustenance of slaves during the voyage, and the slaves were brought to a profitable market at the first place of the ship's destination, where she arrived a mere wreck, and soon after foundered.

Shaw v. *Felton*. 2 E. R. 109

4. Where a ship insured arrived in port a mere wreck, and was obliged to be lashed to a hulk to avoid sinking, and in attempting to remove her to the shore a few days afterwards she sunk; held that the assured might recover as for a total loss, though her cargo was saved and brought to a profitable market. *ib.*

5. Upon a hostile embargo in a foreign port, the owner, who had separately insured *ship* and *freight*, abandoned them to the respective underwriters, which was accepted by them; after which the embargo was taken off, and the ship completed her voyage, and earned freight: held, that the assured could not recover as for a total loss of freight, the freight having been in fact earned; or, supposing it to have been in any other sense lost to the assured by the abandonment of the ship to the underwriters, thereon it was so lost, not by any peril insured against, but by the voluntary act of the assured, in making such abandonment.

M'Carthy v. *Abel*. 5 E. R. 388

6. If a cargo of a perishable nature be insured from *A.* to *B.*, with the usual memorandum, and in the course of the voyage information be received by the master that the port of *B.* is shut against the ships of his nation, in consequence of which the commander of the convoy orders the ship to proceed to another port, and the cargo be sold there by orders of the Vice-Admiralty Court for a very small sum of money, the assured cannot abandon as for a total loss. It seems that if the voyage be lost in consequence of the port of destination being shut up against the ship insured, the assured cannot declare upon this as a loss within the policy.

Hadkinson v. *Robinson*. 3 B. & P. 388

7. Where a neutral ship bound from *America* to *Havre* was detained and brought into a *British* port; and pending proceedings in the Admiralty the king declared *Havre* in a state of blockade, by which the further prosecution of the voyage was prohibited; this was held a total loss of the voyage, which entitled the neutral assured to abandon.

Barker v. *Blakes*. 9 E. R. 283

8. But the blockade of *Havre* having been publicly notified here on the 6th of *September;* and no notice of abandonment given till the 14th of *October*, nor any excuse substantiated for not giving it sooner for want of competent authority before, nor any authority shewn for giving it then: held that the notice was out of time: and this, though the plaintiff's agents in this country had no notice till the 17th of *October* of the decree for restoration of the ship and goods in question, which had been pronounced on the 8th of *October*.

9 E. R. 283

9. A *British* ship insured from *Hull* to *St. Petersburgh*, having sailed under convoy to the *Sound*, was afterwards stopped in her course by a king's ship in the *Baltic*, from an apprehension of hostilities, for eleven days; and then proceeded to a point of rendezvous for convoy, where she waited seven days longer, and then sailed under convoy, till the king's officer received intelligence that a hostile embargo was laid on *British* ships at *St. Petersburgh*, when he ordered the fleet back to the place of rendezvous, from whence the ship returned to *Hull:* held that this loss of the voyage was not attributable to *the arrest or detainment of kings*, &c. but immediately to the fear of the hostile embargo in the port of destination, and therefore not within the policy; though if the ship had not been detained in the first instance by the king's officer, she would have arrived in time at *St. Petersburgh* to have delivered her cargo before the embargo.

Forster v. *Christie*. 11 E. R. 205

10. Policy on fruit from *Cadiz* to *London*, with the usual memorandum. In the course of the voyage the fruit was so much damaged by sea water, that it became rotten and stunk; and on the ship's arrival at an intermediate port, into which she was driven, the government of the place prohibited the landing of the cargo. The ship also being

too much damaged to proceed on the voyage, was sold, and the cargo necessarily thrown overboard: held that the assured were entitled to recover for a total loss.

Dyson v. *Rowcroft.* 3 B. & P. 474

8. A policy of assurance on a ship and stores "at and from a port" in a foreign country, in the common form against arrests of princes, people, &c. extends to an embargo laid on by the government of that country in the loading port.

Rotch v. *Edie.* 6 T. R. 413

9. And if the embargo continue, the assured may abandon and recover as for a total loss. 6 T. R. 413

10. *Qu.* The effect of an embargo by this country laid on a ship insured here? 6 T. R. 412

11. A ship-owner having first insured his *ship* with *A.*, &c. and his *freight* with *B.*, &c. for a certain voyage, and having notice of an embargo laid on the ship in a foreign port, abandons the ship and freight to the respective underwriters, and receives from them the whole amount of their subscriptions as for a total loss of both; first undertaking, by a memorandum on the *ship* policy, to assign to the underwriters thereon his interest in the ship, and to account to them for it; and afterwards undertaking, by a similar memorandum on the *freight* policy, to assign to those underwriters all right of recovery, compensation, &c. The ship being afterwards liberated, and earning freight, which was received by the assured: held, that however the question of priority as to the title to the freight might have been as between the different sets of underwriters litigating out of the same fund, and however the weight of argument might preponderate more in favour of the underwriters on the ship; yet that the assured, who had received the freight from the shippers of goods, was at all events liable on his express undertaking to pay it over to the underwriters on freight; and that, without deducting the expenses of provisions, wages, &c. which were charges on the owner before the abandonment, and on the underwriters on ship afterwards.

Thompson v. *Rowcroft.* 4 E. R. 34

12. S. P. *Leatham* v. *Terry.* 3 B. & P. 479

13. Upon an insurance on profits valued at 400*l.* where the plaintiff declared as for a *total loss*, and it appeared that after a shipwreck, by which many of the slaves, on the profits of whom the insurance was made, were lost, but the remainder reached the market, and were sold; and it did not appear what profit was made of them; though it was found that the produce of those who were sold did not give a profit upon the whole adventure: held, that the plaintiff was not entitled to recover. *Note.*—The whole adventure was a voyage from *Liverpool* to *Africa*, and from thence to the *West Indies*, but the profits were only insured from *St. Vincent's*, after the ship's arrival there) to her last port of discharge in the *West Indies*. *Hodgson* v. *Glover.* 6 E.R.316

14. Policy upon the freight of the ship *Stranger* at and from *London* to *Jamaica*, with liberty to touch at *Madeira* and discharge and take goods on board there. The plaintiffs had agreed by charter-party that the ship should take in goods at *London*, and proceed to *Madeira*, and there deliver such part of the goods shipped at *London* as their agent should direct, and receive on board wine, and proceed to *Jamaica* and there deliver; and the freighter agreed to pay 135*l.* in full for freight during the whole voyage from *London* to *Madeira*, and from thence to *Jamaica*, such freight to be paid in *Madeira*, on delivery of the goods shipped at *London* for that place by *Madeira* wine at 40*l. per* pipe to be carried in the said ship to *Jamaica* free of freight; the ship arrived at *Madeira* and delivered all her *London* cargo, except 33 casks of coals which the captain kept on board to stiffen the ship; having received part of his cargo for *Jamaica*, but not the wine to be paid for freight, a gale of wind arising, the captain was obliged to cut his cables and run out to sea, where he was captured; held, that the plaintiff was entitled to recover for a total loss.

Atty v. *Lindo.* N. R. 236

15. Payment of money into court to the amount of a partial loss upon a valued policy, is not an admission of a total loss. *Ruckerv.Palsgrave.* 1W.P.T.419

VIII. *Loss; Average.*

1. The owners of goods insured by the act of shifting the goods from one ship to another, do not preclude themselves from recovering an average loss arising from the capture of that other ship, if they acted for the benefit of all concerned.

Plantamour v. *Staples.* 1 T. R. 611, *n.*

2. Where a ship is obliged to put into port for the benefit of the whole concern, the charges of loading and unloading the cargo, and taking care of it, and the wages and provisions of the workmen hired for the repairs, become general average. 2 T. R. 408

3. Freight must contribute to general average. 2 T. R. 408

4. Where a ship has been forced by a storm to enter a port in order to repair, and cannot continue her voyage without apparent risk of being lost, the wages and provisions of the crew are to be brought into an average from the day it was resolved to seek such port to the day of departure from it, with all the charges of loading, and every other expense incurred by that necessity. So said in *Beawes*, and seems to have been approved by Lord *Mansfield*, but never determined. 2 T. R. 408, 414

5. If an armed force board a ship, and take part of the cargo, the underwriters are not liable on a count stating the loss to be by a seizure by *people* to the plaintiffs unknown: for "people" in the policy means "the governing power of the country."

Nesbitt v. *Lushington*. 4 T. R. 783

6. Where, after a seizure, the vessel was stranded, and part of the cargo (consisting of corn) taken by the mob at their own price, the loss cannot be recovered, as for a general average: but, for such part as in consequence of the stranding was damaged and thrown overboard, the insured may recover on a count stating the loss to be by stranding. 4 T. R. 783

7. If an insurance be effected on fruit, and the policy contain the usual memorandum "corn, fruit, &c. warranted free from average unless general, or the ship be stranded," and the ship be in fact stranded in the course of the voyage, the underwriters are liable for an average loss arising from the perils of the seas, though no part of the loss arise from the act of stranding.

Burnett v. *Kensington*. 7 T. R. 210

8. The rule by which to calculate a partial loss on a policy on goods by reason of sea damage, is the difference between the respective gross proceeds of the same goods when sound and when damaged, and not the net proceeds: it being settled that the underwriter is not to bear any loss from fluctuation of market or port duties, or charges after the arrival of the goods at their port of destination.

Johnson v. *Sheddon*. 2 E. R. 581

9. A partial loss on a policy on goods by reason of sea damage, is to be calculated by ascertaining the difference between the respective gross proceeds of the same goods when sound and when damaged, and not the net proceeds. *Hurry* v. *The R. Exch. Ass. Co.* 3 B. & P. 308

10. The rule for estimating any loss of goods insured by an open policy is to take the invoice price at the lading port, together with the premium of insurance and commission, as the basis of the calculation of the value of the goods; and the rule for estimating a partial loss in the like case, is (the same as upon a valued policy) by taking the proportional difference between the selling price of the sound, and that of the damaged, part of the goods at the port of delivery, and applying that proportion (be it half, a quarter, an eighth, &c.) with reference to such estimated value at the lading port, to the damaged portion of the goods.

Usher v. *Noble*. 12 E. R. 639

11. If a ship, in order to escape from a privateer, carry an unusual press of sail, and succeed in getting away, but sustain damage in so doing, this is a particular, not a general average.

Covington v. *Roberts*. 2 N. R. 378

12. If an insured declare upon a total loss by capture, and after proving a capture shew a re-capture, upon which proceedings were had in an admiralty court, he cannot recover without proving the proceedings in the admiralty court under seal, though he only claim the amount of the loss sustained by the salvage, proceedings, and sale.

Thellusson & al. v. *Shedden*. 2 N. R. 228

IX. *Policy, subject of; Construction of; and Actions on: and of insurable Interest.*

1. Policies of insurance are to be construed by the same rules as other instruments, unless where, by the known usage of trade, or the like, certain words have acquired a peculiar sense distinct from their ordinary and popular sense.

Robertson v. *French*. 4 E. R. 130

2. According to 25 *G.* 3. *c.* 44. the name of the *party interested* must have

been inserted in a policy of insurance, otherwise he could not recover upon it. *Cox* v. *Parry*. 1 T. R. 464:—(But see stat 28 *G.* 3. *c.* 56. repealing 25 *G.* 3. *c.* 44.)

3. Commissioners appointed by the crown under the authority of an act of parliament (35 *G.* 3. *c.* 80.) which empower them "to take into their possession and care all *Dutch* ships and effects *detained or brought into the ports of Great Britain*, and to manage, sell, and dispose of the same to the best advantage, according to the instructions they should receive from his Majesty and his Privy Council," may insure in their own names such ships and effects, after seizure abroad, and while they are *in transitu* to this country.

Crawfurd & al. v. *Hunter*. 8 T. R. 13

4. A count stating the nature of their trust, and averring the interest to be in themselves as commissioners; and another count to the like effect, but with an averment "that the said ships or any of them were not belonging to his Majesty or any of his subjects," (with a view to stat. 19 *G.* 2. *c.* 37. § 1.) were both held good upon demurrer. 8 T. R. 13

5. So these commissioners were held to have an insurable interest in *Dutch* ships on their passage to this country, having been taken by a captain of a *British* man of war, under instructions from the admiralty to take all ships and cargoes belonging to the subjects of the *United States*, and to bring them into the ports of this kingdom to be detained provisionally.

Lucena v. *Crawfurd* 3 B. & P. 75

6. Held also that they might recover for a loss upon such ships by perils of the sea, though the loss did not happen until after a proclamation had issued for general reprisals against the *Dutch* *ib.*

7. Commissioners were authorized, by a commission granted in pursuance of a statute, to take into their possession ships and goods belonging to subjects of the *United Provinces*, which had been or might be detained in or brought into the ports of this kingdom, and to manage, sell, and dispose of the same to the best advantage, according to such instructions as they should receive from the king in council; before any declaration of war against the *United Provinces*, one of his majesty's ships took several *Dutch East Indiamen*, and carried them into *St. Helena*. The commissioners, with the assent of the lords of the treasury, insured them at and from *St. Helena* to *London*. War was soon after declared against the *United Provinces*, and the ships were finally condemned as prize to his majesty, "as having belonged, when taken, to subjects of the *United States*, since become enemies." Upon a loss happening, the commissioners declared on the policy, and averred the interest to be in the king; and held that the action will lay.

Lucena v. *Crawfurd & al.* 1 W. P. T. 325

8. After a proclamation by the king in council to *detain* and bring into port all *Danish* vessels, *a hired armed ship of his majesty* took and carried into *Lisbon* a *Danish* vessel, and sold her cargo there towards defraying in part the expense of necessary repairs, but without the authority of a court of admiralty; and afterwards took in a cargo on freight for *England*, and sailed on the 3d of *November* from *Lisbon*; on which day *hostilities were declared* against *Denmark* by another proclamation of the king in council; after which an insurance was made on the ship and freight by order and *on account of the captors*. Held, that a statement in a case reserved, that the insurance was *on account of the captors*, precluded the consideration whether a count in the declaration could be sustained, averring the interest to be in the crown, and the insurance to be made *on account of his majesty*; and that the captors had no insurable interest, as they could claim nothing of right, but only *ex gratia* of the crown; the *Dane* having been seized and detained *before any declaration of war* against *Denmark*, and the captors having no claim to prize under the prize acts. But as there was no fraud in the captors in effecting the policy, nor any thing illegal in the voyage or insurance; held that the assured were entitled to recover back the premium, which had not been paid into court.

Routh v. *Thompson*. 11 E. R. 428

9. At common law a person might have insured, without having any interest in the subject insured. 8 T. R. 13

10. And the stat. 19 *G.* 2. *c.* 37. which prohibits such an insurance, only applies to "ships belonging to his majesty or any of his subjects." 8 T. R. 13

11. A declaration on a policy of insurance on a *foreign* ship need not aver any interest in the assured: though there be no such words as "interest or no interest" in the policy.

Nantes v. *Thompson*. 2 E. R. 385

12. *Qu.* Whether if no interest be averred, it is not sufficient, under the stat. 19 *G.* 2. *c.* 37. § 2., to state that the ship was foreign when the policy was under-written and the loss happened, without stating the ship to be such when the risk commenced.

Kellner v. *Le Mesurier*. 4 E. R. 396

13. Captors of a ship seized as prize may insure their interest therein.

Boehm & al. v. *Bell*. 8 T. R. 154

14. A prize taken by the navy and army conjointly is insurable, on account of the interest of the captors, under the stat. 45 *G.* 3. *c.* 72. § 3. which grants the prize so taken to the conjoint captors after condemnation, subject only to the apportionment of the crown as to the respective shares.

Stirling, Bt. v. *Vaughan*. 11 E. R. 619

15. Where a bill of lading is indorsed and delivered, but the intention of the parties appears to have been only to bind the net proceeds in case of the arrival of the goods, an insurance made on account of the indorser after such indorsement is good.

Hibbert v. *Carter*. 1 T. R. 745

16. *A.* being indebted to *B.* without any order from him, consigns goods to *C.* to be held for *B.*, and indorses the bill of lading to *C.*: resolved that *B.* had an insurable interest in the goods so consigned.

Hill & al. v. *Secretan*. 1 B. & P. 315

17. *A.* having consigned a cargo to *B* and drawn bills on him to the amount of it in favour of *C.* his general agent, sends these bills, together with the bills of lading, to *C.*, desiring him to transmit them to *B.*, "that *B.* may have an opportunity of insuring:" he also draws a bill for 300*l.* on *C.*, which is accepted; *B.* refuses to take to the cargo or accept the bills drawn on him; *C.* then effects a policy in his own name, and informs *A.* thereof, who approves of his conduct. In an action by *C.*, stating himself in the first count to be the agent of *A.*, and averring interest in him; in the second averring interest in himself: held, first, that the policy was good within 28 *G.* 3. *c.* 56.; secondly, that *C.* had an insurable interest to the amount of 300*l.*

Wolff & al. v. *Horncastle*. 1 B. & P. 316

18. Two partners purchased a ship under a bill of sale conformable to stat. 26 *G.* 3. *c.* 60; afterwards they took in two other partners but there was no transfer of the ship to them jointly with the others; held that the four partners had not any insurable interest in the freight of the ship.

Camden v. *Anderson*. 5 T. R. 709

19. The right of freight results from the right of ownership: and these four partners had neither a legal nor an equitable title to the ship. 5 T. R. 709

20. A party cannot insure a hope or expectation, not having any interest in the subject insured; *sembl.*

5 T. R. 709

21. The profits of a cargo of goods may be insured.

Grant v. *Parkinson, cited*. 6 T. R. 483

22. A sailor cannot insure either his wages, or any thing that he is to receive at the end of the voyage in lieu of wages: (*e. g.* slaves).

Webster v. *De Tastet*. 7 T. R. 157

Nor can he recover the value of such thing in an action against his agent for negligence in not procuring such insurance. *ib.*

23. The profits of a cargo employed in trade on the coast of *Africa* are an insurable interest

Barclay v. *Cousins*. 2 E. R. 544

24. So an insurance *on imaginary profits* from *Bourdeaux* to *Hamburgh* (which was explained to mean the profit which a cargo of indigo belonging to the assured would produce on the sale thereof at *Hamburgh*, if it arrived safe) was holden good. *Henricksen* v. *Margetson*, *B. R. Mich* 1776 *(cited)* 2 E. R. 549, *n.*

25. An insurance on the "commission, privileges," &c. of the captain of a ship in the *African* trade is legal.

King v. *Glover*. 2 N. R. 206

26. The plaintiff having shipped goods on an adventure to *St. Petersburgh* on board a vessel chartered for the purpose, made insurance on ship and goods in the common printed form in blank; and by a written memorandum in the policy "the underwriters agreed to pay a total loss in case the ship *Anne* should not be allowed by the *Russian* government to discharge her cargo at *St. Petersburgh*, on which voyage the vessel had then sailed, chartered by the plaintiffs." The Court

of K. B. held that the assured were entitled to recover upon this policy on an allegation that the vessel on her arrival at *St Petersburgh*, was not allowed by the *Russian* government to discharge her cargo, but was obliged to return back with it, *by which the value of the cargo was reduced below the amount of the invoice price together with the charges paid thereon, and the premium of insurance*, &c.

Puller & al. v. *Glover*. 12 E. R. 124

27. If *A.* and *B.* declare upon a policy of insurance, and aver that they were interested until and at the time of the loss, and it be proved that *C.*, after the policy was effected, but before the loss, became a partner with *A.* and *B.* in the goods insured; it seems that the variance is not fatal, for the averment of interest relates to the time of making the policy. *Perchard* v. *Whitmore. G. H. Sitting after M.* 1780. *cor. Buller*, J. 2 B. & P. 155, *n.*

28. And it seems that independently of that consideration, the variance would be immaterial, for in a declaration on a policy of insurance, the plaintiff averred that Messrs. *H.*, at the time of effecting the policy, and at the time of the loss, were interested in the cargo which was the subject of the insurance "to a large amount, to wit, to the amount of all the money ever insured thereon;" at the trial it appeared, that previous to effecting the policy Messrs. *H.* had admitted another mercantile house to a joint concern in the cargo insured: held that the averment was supported by the evidence.

Page v. *Fry*. 2 B. & P. 40 (And see 2 B. &. P. 153. tit. PLEADING II.)

29. A policy may be transferred, and an action maintained in the name of the assignor. 1 T. R. 26

30. If a ship or cargo insured be taken and condemned as prize, it is not necessary for the insured to make any claim or appeal before they call on the underwriters. 3 T. R. 477

31. Where a ship was chartered from *A.* to *B.*, there to take on board certain goods, and proceed to *C.*, &c. for which the owner was to receive freight at so much *per* ton, a policy of insurance on such freight was held to attach from the sailing of the ship from *A.*

Thompson v. *Taylor*. 6 T. R. 478

32. Aliter, if the freight had been on goods, and the loss had happened before the goods were on board. 6 T. R. 478

33. Where a ship was chartered from *L.* to *D.* and back to *L.*, and after delivering her cargo at *D.* she was to be provided with a cargo homewards at the current freight: held that an insurance by the owner on the freight at and from *D.* to *L.* attached whilst the ship lay at *D.* delivering her outward-bound cargo, and before any of her homeward-bound cargo was shipped.

Horncastle & al. v. *Suart*. 7 E. R. 400

34. Rice is not corn within the meaning of the memorandum of a policy of insurance.

Scott v. *Bourdillon*. 2 N. R. 213

35. An averment of interest at the time of effecting the policy is immaterial, and need not be proved; it is sufficient if the plaintiff be interested at the commencement of the risk. 2 W. P. T. 237

36. An *American*, who is owner of a ship only as trustee, and would not thereby be entitled to the privileges of the *American* flag under the laws of his own country, has a sufficient interest to maintain an action on a policy.

Rhind v. *Wilkinson*. 2 W. P. T. 237

37. Under a licence to *A.* to import goods the property of *A.*, as specified in his bills of lading, if the goods be consigned to others with particular bills of lading, a general bill of lading signed to *A.*, without proof of some special interest in *A.* in the goods, will not entitle the consignment to the benefit of the licence.

Feise v. *Waters*. 2 W. P. T. 248

38. Otherwise, if *A.* had had a special property in the goods. 2 W. P. T. 248

X. *Re-assurance.*

1. Every re-assurance in this country, by *British* subjects or foreigners, whether on *British* or foreign ships, is void, by stat. 19 *G.* 2. *c.* 37. §4. unless the insurer be insolvent, become a bankrupt, or die. *Andree* v. *Fletcher*. 2 T. R. 161: (and see ASSUMPSIT VI. 31, 33.)

XI. *Return of Premium.*

1. The insurer on freight agreed to return part of the premium "if the ship sailed with convoy and *arrived*;" held that the insured were entitled to that return, the ship having sailed with convoy and arrived, though she had been captured and re-captured, and the assured had been obliged to pay for salvage.

Aguilar v. *Rogers.* 7 T. R. 421

2. Policy on the *Ceres* "at and from *Oporto* to *Lynn*, with liberty to touch at any ports on the coast of *Portugal* to join convoy, particularly at *Lisbon*, at 12 guineas *per cent.* to return six pounds *if she sail with convoy from the coast of Portugal* and arrive;" the *Ceres* sailed from *Oporto* with a sloop and cutter appointed to protect the trade of that place to *Lisbon*, from whence it was to proceed with the *Lisbon* trade under a larger convoy for *England;* in the way from *Oporto* to *Lisbon* the fleet was dispersed by a storm, and the *Ceres*, judging for the best, run for *England*, and arrived: held, that the assured was entitled to a return of premium.

Audley v. *Duff.* 2 B. & P. 111

3. So where the words were "if she depart with convoy from *Portugal* and arrive." *Everard* v. *Hollingworth.* 2 B. & P. 111, *n.*

4. A clause in a ship policy at and from *Lisbon* to *Cadiz* and at and from thence to *Flushing*, at a premium of 20*l. per cent.*, to return 8*l. per cent.*, if the ship insured sailed with convoy from *Cadiz* for *England*, and 2*l. per cent.* more for convoy from *England* to *Flushing*, or 10*l. per cent* if with convoy for the voyage, *and arrived*, does not entitle the assured to a return of premium of 8*l. per cent.* in consequence of the ship's arrival merely in *England* with convoy from *Cadiz*, being afterwards captured before her arrival at *Flushing:* for *arrival* means *at the ultimate port of destination.*

Kellner v. *Le Mesurier.* 4 E. R. 396

5. Where captors of a ship, seized as prize, insure their interest therein, they are not entitled to a return of premium, though it be afterwards adjudged to be no prize, and restitution be awarded to the owners by the Court of Admiralty.

Boehm & al. v. *Bell.* 8 T. R. 154

6. In an insurance of a ship at and from *Hull* to *Bilboa*, warranted to depart from *England* with convoy, the voyages from *Hull* to *Portsmouth* where she meets with convoy, and from thence to *Bilboa*, may be considered as distinct; and in case of a loss between the two latter places, an apportionment and return of premium may be demanded.

Rothwell v. *Cooke.* 1 B. & P. 172

7. The premium paid on an illegal insurance to cover a trading with an enemy, cannot be recovered back, though the underwriter cannot be compelled to make good the loss.

Vandyck v. *Hewitt.* 1 E R. 96

8. An insurance having been made on goods at and from a port in *Russia* to *London*, by an agent residing here for a *Russian* subject abroad, which insurance was in fact made after the commencement of hostilities by *Russia* against this country but before the knowledge of it here, and after the ship had sailed and been seized and confiscated; the Court of K. B. held that the policy was void in its inception; but that the agent of the assured was entitled to a return of the premium paid under ignorance of the fact of such hostilities.

Oom & al. v. *Bruce.* 12 E. R. 225

9. A foreigner cannot recover back the premium paid by him upon a policy of insurance, if the voyage be in contravention of the *British* laws. Therefore where a policy was effected upon a *Danish* ship at and from *Bengal* (where there are *Danish* settlements) to *Copenhagen*, and the ship loaded at *Calcutta* contrary to 12 *Car.* 2. *c* 18. § 1. the Court of (C. P.) held the assured was not entitled to recover back the premium, even though it appeared that the practice of loading foreign ships at *Calcutta* had prevailed for a length of time, and had been authorized by act of parliament soon *after* the shipment in question.

Monck v. *Abel.* 2 B. & P. 35

(And see *post* XII. 7.)

10. In an action on a policy of insurance, with a count for money had and received, if the defendant pay no money into court, but establish as a defence that the risk never commenced, the plaintiff is entitled to a verdict for the premium, though no demand of premium was made by his counsel in opening the case.

Penson v. *Lee.* 2 B. & P. 330

11. The broker effecting a policy, being the common agent of the assured, and of the underwriter, while the premium remains in his hands for the one party, and the policy for the other, and having received notice of events which entitled the assured to a return of premium before action brought by the underwriter to recover the full premium, is authorized to deduct such return, and only to pay over the difference to the underwriter.

Shee v. *Clarkson & al.* 12 E. R. 507

XII. *Void, vacated, or illegal.*

1. *Qu.*—How far polices on neutral property, though bound to an enemy's port, are void? *Gist* v. *Mason.* 1 T. R. 84. (But insurances on enemy's property are generally unlawful.—— *Brandon* v. *Nesbitt.* 6 T. R. 23: *Bristow* v. *Towers.* 6 T. R. 35. And see tit ALIEN, and stats. 33 *G.* 3. *c.* 27. § 4: 34 *G.* 3. *c.* 79. § 17.

2. Where a certain trading with an alien enemy for specie and goods to be brought from the enemy's country, in his ships, into our colonial ports, was licensed by the king's authority; the Court of K. B. held that an insurance on the *enemy's ship*, as well as on the goods and specie put on board for the benefit of the *British* subjects was incidentally legalized; and that it was competent for the *British* agent of both parties, in whose name the insurance was effected, to sue upon the policy in time of war; the trust not contravening any rule of law or of public policy, and there being no personal disability in the plaintiff on the record to sue.

Kensington v. *Inglis.* 8 E. R. 273

3. It is no breach of neutrality for a neutral ship to carry enemy's property from its own to the enemy's country; the voyage and commerce not being of a hostile description, nor otherwise expressly or impliedly forbidden by the law or policy of this country; though the neutral thereby subjects his ship to be detained and carried into a *British* port for the purpose of search: And therefore a *British* underwriter, after condemnation of the enemy's goods found on board, and liberation of the ship and the rest of the cargo, is liable to the neutral owner of goods insured in the same ship, whose voyage was so interrupted either as for a total loss, if notice of abandonment upon the loss of the voyage be given in reasonable time, or for an average loss, if such notice be given out of time.

Barker v. *Blakes.* 9 E. R. 283

4. Where an act, prohibiting intercourse with *America*, then in a state of rebellion, enabled the *British* commanders to grant licenses in a certain form to carry provisions to places in *America* occupied by the *British*, and a licence was granted not following the requisitions of the act, it was holden void; and consequently the trading being illegal, the goods sent under the licence could not be insured.

Vankarthals v. *Halhed, M.* 31 *G.* 3. 1 E. R 487, *n.*

5. As the king cannot licen e the importation of enemy's property the produce of a foreign country into this realm, in neutral vessels contrary to the navigation laws, a license in fact granted for such purpose will not legalize an insurance upon the property so imported. And if a policy be made upon the supposed efficacy of such a licence for the purpose of covering the importation of *British* as well as enemy's property in that manner, the underwriters cannot at any rate recover the premiums for more than the amount of the *British* interest insured; the assured not resisting their claim to that extent.

Shiffner v. *Gordon & al.* 12 E. R. 296

6. If a license be obtained from the *British* government by *A.* to import from an enemy's country in six ships such goods as should be specified in his bills of lading, and goods be imported on board one of the six ships on account of *B. C.* and *D.* to whom several bills of lading are sent for their respective goods, and one general bill of lading for the whole cargo be sent to *A.*, the whole cargo will be protected. *Defflis* v. *Parry.* 3 B. & P. 3

7. A license from the king to *T. B.* to import in neutrals, from an enemy's country, goods being the property of *T. B.* cannot be assigned so as to authorize the importation of goods the property of the assignee.

Feise v. *Thompson.* 1 W. P. T. 121

8. The stat. 47 *G* 3. *c.* 2. legalizes from *Sept* 17, 1806, the trading to any places which then were, or should thereafter be, under the dominion of his majesty. *Buenos Ayres* was taken by his majesty's troops in the preceding year, and retaken on the 12th *August*, 1806. Held that an adventure to *Buenos*

Ayres, commencing in the first week of *Sept.* 1806, was illegal, and the policy on it void.

Toulmin v. *Anderson.* 1 W. P. T. 227

9. A policy on a foreign ship must be understood as containing an exception of all captures made by the authority of our own government.

Kellner v. *Le Mesurier.* 4 E.R. 396

10. An underwriter on *French* property in time of peace is not liable for a loss occasioned by capture by the king's ships during hostilities which commenced against *Great Britain* and *France* subsequent to the policy being effected, and terminated prior to the action brought. *Gamba & al.* v. *Le Mesurier.* 4 E. R. 407

11. An insurance on goods from *London* to *Bayonne* in *France*, shipped on board a neutral ship on account and at the risk of *Frenchmen, before* the declaration of hostilities between *Great Britain* and *France*, but *exported* afterwards, cannot be enforced against the underwriters, even after the restoration of peace, to recover the loss by capture of a co-belligerent (though not stated to be an *ally*) during the war. For every insurance on alien property by a *British* subject must be understood with this implied exception, that it shall not extend to cover *any* loss happening *during the existence of hostilities* between the respective countries of the assured and the assurer.

Brandon v. *Curling.* 4 E. R. 410

12. An insurance effected in *Great Britain*, on a *French* ship previous to the commencement of hostilities between *Great Britain* and *France*, does not cover a loss by *British* capture.

Furtado v. *Rodgers.* 3 B. & P. 191

13. If a *Swedish* ship be insured at and from her loading port in the *East Indies* to *Gottenburgh*, and part of the cargo be laden in a *British* port in the *East Indies*, the insured cannot recover, the voyage being in contravention of the navigation laws.

Chalmers v. *Bell.* 3 B. & P. 604 (And see *ante* XI. 8.)

14. Where a policy does not appear on the face of it to be illegal, the court will not grant a new trial, in order to let the defendant into proof that it was so; but he should have shewn it on the trial. 1 T. R. 84

15. If there be any illegality in the commencement of *an integral voyage*, and an insurance be effected on the latter part of the voyage, which taken by itself would be legal, yet the assured cannot recover on the policy. 8 T. R 31; 45, 6

16. So if a ship be insured "*at* and from *A.* to *B.*," and there be any illegality in the traffic during her stay at *A.* the assured cannot recover on the policy for a loss happening between *A.* and *B.*

Bird & al. v. *Appleton.* 8 T. R. 562

17. But an insurance on a ship for a particular voyage is legal, though she may have done some act in a former voyage for which she was liable to seizure during the voyage insured. *ib.*

18. And goods may be insured though purchased with the proceeds of a former illegal cargo. *ib.*

19. Where an embargo had been laid on provisions in *Ireland*, and insurance on such provisions from thence, laden on board a vessel bound to an enemy's port, was held void. *Dalmady* v. *Motteux, H.* 26 *G.* 3. 1 T. R. 85, *n.*

20. The stat. 16 *G.* 3. *c.* 5. which subjected to forfeiture all *American ships* and *all other ships with their cargoes trading to any part of the colonies*, does not extend to the property of *Americans* on board any *other ship not trading to one of those ports*; so, that an insurance on the property of *Americans* in a *Dutch* ship *from Amsterdam to St. Eustatia* is not prohibited by that act. 3 T. R. 477

21. The exclusive right of trading to the *East Indies*, granted to the *East India* Company by stat. 9 & 10 *W.* 3. *c.* 44. has never been put an end to; and any infringement of it is a public wrong; and though such parts of that act as inflicted penalties, *&c.* were repealed by stat. 33 *G.* 3. *c.* 52., and though the latter act says that no acts or parts of acts thereby repealed shall be pleaded or set up in bar of any action, *&c.* it is competent to underwriters who have subscribed policies on ships tracing to the *East Indies* in contravention of the statute of *Will.* to avail themselves of the illegality of such trading in an action brought on the policies.

Camden v. *Anderson.* 6 T. R. 723 (affirmed in *Cam. Scac.* 1 B. & P. 272)

22. Colonial produce cannot legally be shipped from the *British West Indies* for *Gibraltar*, and therefore the same cannot be insured on such a voyage. And it matters not that part of the

cargo was shipped at one of the *West India* islands, with liberty to exchange it at another (which would have been legal), if in fact it were not exchanged, and its ultimate destination was *Gibraltar*. And the ship and cargo being lost off *Gibraltar*, though the assured could not recover, yet the premium having been paid upon an illegal insurance cannot be recovered back.

Lubbock v. *Potts*. 7 E. R. 449

23. If the credit of any company (except the *Royal Exchange* Assurance Company and the *London* Assurance Company) be in any event pledged in a contract of insurance, the contract is void by stat. 6 *G.* 1. *c.* 18. § 12.

7 T. R. 341

24. Therefore where a company of ships owners engaged to ensure each other's ships, and covenanted *severally*, and not jointly, to pay a certain sum in case of loss in proportion to their respective shares, but in case of the insolvency of any one of the members, all the others were to be responsible; held that this contract was void.

Lees v. *Smith*. 7 T. R. 338

25. Where one of two partners underwrites policies of insurance upon ships, *&c.* in his own name, but upon their joint account, contrary to the 6 *G.* 1. *c.* 18. § 12., no action can be maintained to recover the premiums upon such policies from the assured.

Branton v. *Taddy*. 1 W. P. T. 6

26. After an insurance on a ship on a trading voyage the assured applied to the underwriters for leave to take in guns and a letter of marque, the latter of which was positively refused, notwithstanding which the ship sailed with a general letter of marque: this vacated the policy, though the assured did not in fact make use of the letter of marque for the purpose of cruising, or intend so to do, but merely took it on board for the purpose of cruising on the voyage home.

Denison v. *Modigliani*. 5 T. R. 580

27. The assured upon a trading voyage taking out a letter of marque (but without a certificate which is necessary to its validity) unknown to the underwriters, solely with a view to encourage seamen to enter, and without any intention of using it for the purpose of cruising, though the vessel was armed for self defence, is not such an alteration of circumstances as will avoid the policy.

Moss v. *Byrom*. 6 T. R. 379

28. And if the captain, contrary to the instructions of his owner, cruise for and take a prize, and the vessel be afterwards lost in consequence of it, it is an act of barratry; although the captain libelled the prize for the benefit of his owner as well as himself.

6 T. R. 379

29. A policy of insurance on a ship on a certain commercial voyage, *with or without letters of marque*, giving leave to the assured to *chase, capture, and man prizes*, however it may warrant him in weighing anchor, while waiting at a place in the course of the commercial voyage insured, for the purpose of chasing an enemy who had before anchored at the same place in sight of him, and was then endeavouring to escape, will not warrant him, after the capture, and in the course of the further prosecution of the voyage, in *shortening sail* and *laying to*, in order to let the prize keep up with him, for the purpose of protecting her *as a convoy* into port, in order to have her condemned: though such port were within the voyage insured.

Lawrence v. *Sydebotham*. 6 E. R. 45

30. Whether an insurance of a ship *with or without letter of marque* upon a certain voyage and commercial adventure from *A.* to *B.*, enables her to *chase* for the purpose of hostile attack, and capture any vessel she may happen to descry in the course of the voyage insured, in whatever direction, or to any limit, and whether known at the commencement of such chasing to be an enemy or not; or whether those words are to be confined to a leave to employ force only for the purpose of *defence* (including a liberty of attack and chase only as far as they may be fairly supposed to promote ultimate security); must, in the absence of any legal decision as to their construction, depend upon the received practice and known sense of commercial men, if any such received practice there be in the use of them. And therefore the cause was referred to another trial to ascertain the commercial usage and practice in that respect. But at any rate such words do not appear to authorize direct *cruizing* out of the course of the voyage in search of prize.

Parr v. *Anderson*. 6 E. R. 202

XIII. *Warranty or Representation.*

1. Whatever is written in the margin of a policy of insurance is a warranty. 1 T. R. 345

2. A warranty in a policy of insurance is a condition; and unless it be performed there is no contract. 1 T. R. 345

3. Difference between a representation and a warranty: the former may be *substantially*, the latter must be *strictly* complied with.

De Hahn v. *Hartley.* 1 T. R. 343 [Affirmed in *Cam. Scac.* 2 T. R. 186]

4. If a policy of insurance from fire refer to certain printed proposals, the proposals will be considered as part of the policy. *Routledge* v. *Burrell Bt. & al.* 1 H. B. 254: *Wood & al.* v. *Worsley*, 1 H. B. 574; and *Worsley* v. *Wood (in error.)* 6 T. R. 710 (See title COVENANT II. 6.)

5. How far a representation made to one underwriter on a policy shall be taken to extend to subsequent underwriters, and what shall be evidence of it. *Vide Marsden* v. *Reid.* 3 E. R. 572

6. Goods were insured from the lading of them on board the ship "lost or not lost," and warranted well on a particular day; the ship was lost on that day before the policy was underwritten: and it was holden that the underwriter was liable, for the warranty was complied with by the ship's being safe any time of that day.

Blackhurst v. *Cockell.* 3 T. R. 360

7. A policy of insurance is made on a ship, on a voyage from *A.* to *C.*, warranted to depart with *convoy for the voyage.* The convoy appointed is to *B.*, a port in the course, and near to *C.* This is a compliance with the warranty, and the underwriters are liable, the ship being captured in the passage from *B.* to *C.*

D'Eguino v. *Bewicke.* 2 H. B. 551

8. The term *convoy* in a policy means such a convoy as shall be appointed by government. 2 H. B. 551

9. If goods be insured from *A.* to *B.* in a *neutral* ship, it is sufficient to charge the underwriters that the ship was neutral *when she sailed*, though hostilities commence during her voyage.

Tyson v. *Gurney.* 3 T. R. 477

10. But the ship must not forfeit its neutrality by the misconduct of the parties on board 8 T. R. 234

11. A warranty of *Danish property (Denmark* being then a neutral power) in a policy of insurance on ship and goods, was holden to be conclusively disproved by a sentence of a Court of Admiralty, condemning the ship and cargo, because the master and crew had broken their neutrality in the course of the voyage insured, by forcibly rescuing the ship, which had been seized and carried into port by a belligerent power for the purpose of search *Gurrels & al.* v. *Kensington.* 8 T. R. 230

12. Any forfeiture of neutrality, by the wilful act of the assured, or of the master, &c. after the commencement of the voyage insured, is a breach of such a warranty. 8 T. R. 230

13. A warranty in a policy of insurance that the ship is *American* property, means that the ship is entitled to all the privileges of an *American* flag; (which is required by treaty between *France* and *America)* the warranty is not complied with, and the assured cannot recover against the underwriter; though in fact the ship suffer no inconvenience in the voyage from the want of the passport.

Rich v. *Parker.* 7 T. R. 705

14. Goods being insured on board a ship which was in fact an *American*, but not mentioned as being such at the time of the policy subscribed, though the broker had before said she was an *American* when the slip was subscribed, but the insurance being ultimately effected on her generally by her name: held that she need not be documented as an *American*, and therefore, in case of a capture and condemnation by a foreign power for want of the documents required by treaty between that state and her own, the owners of the goods were entitled to recover against the underwriters.

Dawson & al. v. *Atty.* 7 E. R. 367

15. An assured upon an *American* ship and cargo, provided with such a passport as is required by the treaty between *America* and *France*, and with all other usual *American* papers and documents, is entitled to recover against an underwriter of a policy on such ship and goods, in case of a capture by a *French* privateer, notwithstanding a sentence of condemnation of the same as lawful prize by a *French* Court of Admiralty; such sentence proceeding on the ground of a breach of *French*

ordinances, requiring certain particulars to be observed in respect of the ship documents beyond what was accessary by the treaty.

Price v. *Bell.* 1 E. R. 663

16. *Qu.* Whether if a ship be not warranted of any particular country, there be an implied warranty in a policy of insurance that she shall be properly documented according to the laws of that country, and her particular treaties with foreign states. *ib.*

17. The 25th article of the treaty of *February*, 1778, between *France* and *America*, which requires the vessels of the two allies, in case either is at war, to be furnished with a passport expressing *(inter alia) the place of habitation* of the commander of the vessel, is not complied with by a passport, granting leave to *G. D.* commander of the ship called the *M. V. of the town of P.*, of the burden of, &c. such description of place being applicable only to the *ship*, and therefore the plaintiff was holden not entitled to recover upon a policy of insurance on such ship, warranted *American*, which had been captured by the *French*, and condemned as prize.

Baring v. *Christie.* 5 E. R. 398

18. In an action on a policy of insurance on goods warranted *American* on board a ship from *London* to *Virginia*, a sentence of a foreign court, which after reciting that "forasmuch as the true destination of the vessel was for the *English* islands, having been hired and loaded at *London*, and having on board eighty barrels of gunpowder," declares the ship and cargo a good prize, is not conclusive evidence against a warranty of neutrality; because the special grounds assigned for the sentence, do not necessarily lead to such conclusion. *Calvert* v. *Bovill.* 7 T. R. 523

19. By the sentence of a *French* Court of Admiralty, it appeared that the ship insured, *warranted American*, had been condemned as enemy's property for want of having on board a *rôle d'équipage* or list of the crew, such as is required by a marine ordinance of *France*, and adjudged by the court there to be requisite within the meaning of the treaty of commerce between *France* and *America*; held to be conclusive evidence against the warranty of neutrality, in an action on a policy of insurance, though in fact the ship was *American*. *Geyer* v. *Aguilar.* 7 T. R. 681

20. But where a ship warranted neutral was condemned as prize by a *French* Court of Admiralty, and a Court of appeal afterwards reversed such sentence, but refused to give damages or costs on account of the muster-roll not expressing the place of nativity of the crew according to an ordinance of *France*, and it was proved that the ship was otherwise properly documented as a neutral: the Court of C. P. held that the assured might recover for the detention, notwithstanding such refusal of the court of appeal to allow damages or costs.

Siffken v. *Lee.* 2 N. R. 484

21. A sentence of a foreign Court of Admiralty is only conclusive here, in an action on a policy of insurance, as to the express ground of the sentence, but not as to any of the premises (noticed in the consideratory part of the sentence) that led to the adjudication.

Christie v. *Secretan.* 8 T. R. 192

22. A sentence of condemnation by a *French* court sitting in *Spain*, of a prize taken by a *French* privateer and carried in there *(Spain* being then a belligerent ally of *France* in the war against *Great Britain)* is valid; and such condemnation, proceeding on the ground of the property being *enemy's, and British*, is conclusive in an action on a policy against the underwriter by the assured who had insured it as *Danish*, which in fact it was, *Denmark* being then *neutral.*

Oddy v. *Bovill.* 2 E. R. 473

23. Where a foreign Court of Prize professes to condemn a ship and cargo on the ground of *an infraction of treaty* in not being properly documented, &c. as required by the treaty between the captors and captured; such sentence is conclusive in our courts against *a warranty of neutrality* of such ship and cargo in an action upon a policy of insurance against the underwriter; although inferences were drawn in such sentence from *ex parte* ordinances in aid of the conclusion of such infraction of treaty. *Baring* v. *The Royal Exchange Assurance Company.* 5 E. R. 99

24. A sentence of a foreign Court of Prize is conclusive evidence in an action upon a policy of insurance upon every matter within the jurisdiction of such court upon which it has professed to decide. Therefore where a *Danish* ship, *warranted neutral*, was captured

by a *French* ship of war *(Denmark* being at peace with *France)*, and the court in which she was libelled as prize, professing to consider that the *built* of the vessel was *unknown*, that she was *sold* to a *neutral* subject *only since* the declaration of war, that the bill of sale does not mention her *place of built*, or her *original owner*, that the mate and third officer were naturalized *Danes only since* the declaration of war, and that the greater part of the *crew* were subjects of *hostile* powers, condemned the ship as *good and lawful prize;* such condemnation is conclusive against the *warranty of neutrality* in an action on the policy against the underwriter. And no evidence can be received to falsify the facts affirmed by such sentence, nor to shew that the conclusion was unfounded: although the sentence proceeded to refer to certain ordinances of *France*, containing rules to direct the judgment of its courts in the consideration of the question of neutrality; by which rules the Prize Court appeared to have regulated their judgment in the conclusion they had drawn. *Bolton* v. *Gladstone*. 5E.R 155

25. Policy of insurance on board the *Catherine*, an *American* vessel. After the policy was effected, doubts having arisen, whether the policy contained a warranty, the underwriters signed an agreement, that in case of capture or seizure, the assured, before they claimed for a loss, must produce proofs of the ship being *American* bottom, and by bills of lading shew that the cargo had been shipped on account and risk of *A. B.*, upon which they would settle by granting bills at four months for the amount of their subscriptions, in full dependance that the insured would use their best endeavours to recover the property as for account of the shippers; held, that on proof being produced that the ship was *American* bottom, and the cargo shewn by bills of lading to have been shipped on account and risk of *A. B.*, the assured were entitled to recover, on a loss of capture, notwithstanding the production by the underwriters of any *French* sentence of condemnation to falsify the warranty. *Lothian* v. *Henderson*. 3 B. & P. 499

26. A sentence of condemnation in a *French* Court of Admiralty, is admissible evidence in an action here between the assured and underwriters of a policy of insurance containing a warrantry of neutrality. *ib.*

27. It seems that the sentence of a foreign Court of Admiralty, condemning a ship warranted neutral, in which the consideration leading to the judgment proceeds on the want of a document not required by the law of nations, but which adjudges "lawful prize all the goods and effects which compose the cargo of the said ship, since the whole, owing to the captain not being provided with proper and regular dispatches and papers, is to be deemed the property of the enemies of the *French* republic," is conclusive evidence against the warranty of neutrality. *ib.*

28. Policy of insurance on a ship warranted *American*. To negative this warranty, a sentence of condemnation of a *French* court at *St. Domingo* was given in evidence, which began thus: "condemnation of the *English* ship *Mount Vernon*. Extracted from the books of the office of the Provisional Tribunal respecting prizes established at *St. Domingo*, We, *F. P.*, judges," *&c.;* and after stating the circumstances of papers having been thrown overboard, the captain and supercargo having abandoned the ship, the captain being a *Portuguese*, without a certificate of his naturalization, and the *United States*, in their last treaty with *England*, having suffered to be added to the articles which had before been considered as contraband of war, slaves, &c. were sufficient motives to condemn the said ship, condemned the same as property belonging to the captor: held that this sentence was conclusive evidence that the ship was not *American*. *Baring* v. *Clagett*. 3B.&P.201

29. *Qu.* Whether, if a ship be warranted *American*, the assured does thereby undertake that she shall be owned and navigated according to all the regulations of the *American* navigation act? *ib.*

30. A warranty of neutrality is not falsified by a sentence of a foreign Court of Admiralty condemning a ship for navigating contrary to the ordinances of that belligerent state, to which the neutral country had not assented.
Pollard & al. v. *Bell*. 8 T. R. 434:
Bird v. *Appleton*. 8 T. R. 562.

31. Sailing orders are necessary to the performance of a warranty to depart

with convoy, unless particular circumstances exempt the insured from that rule. *Webb* v. *Thompson.* 1 B. & P. 5

32. A warranty to depart with convoy is not complied with, unless sailing instructions be obtained before the ship leaves the place of rendezvous, if by due diligence of the master they can be obtained.

Anderson v. *Pitcher.* 2 B. & P. 164

33. Where a policy described the insurance to be on goods on board the ship "called *The American Ship President;*" this was taken to be all *name* of the ship, and not a *warranty* of her being an *American* ship called *The President.* And where the policy, after such name had the words, "*or by whatever other name the same ship should be called,*" it was holden to be no variance that the real name of the ship was *The President;* the identity of the ship meant to be insured with that name being proved.

Le Mesurier v. *Vaughan.* 6 E. R. 382

34. S. P. *Hall* v. *Molineux, Guildhall,* 1744, *cor. Lee* C. J. *(cited.)* 6 E. R. 385

35. A ship being insured at and from *Surinam,* and all or any of the *West India* islands, to *London;* a warranty to sail on or before the 1st of *August,* is satisfied by the ship sailing from *Surinam,* her last port of lading, before the 1st of *August,* and going into *Tortola* on the 4th, to seek convoy, though she did not sail from *Tortola,* which is one of the *West India* islands, direct for *London,* till afterwards.

Wright v. *Shiffner.* 11 E. R. 515

36. If a ship be warranted free of capture or seizure in port or ports, a capture by an enemy's ship while the vessel insured is lying in an open road, outside of an harbour, is not within the warranty.

Brown v. *Tierney.* 1 W. P. T. 517

XIV. *Lives; Insurance on.*

1. Insurance on a life for a year, if the person die after the expiration of it, though in consequence of a mortal wound received before, the insurer is discharged. 1 T. R. 260

2. A creditor may insure the life of his debtor to the extent of his debt; but such a contract is substantially a contract of indemnity against the life of the debtor; and therefore, if, after the death of the debtor, his executors pay the debt to such insuring creditor, the latter cannot afterwards recover upon the policy: although the debtor died insolvent, and the executors were furnished with the means of payment by a third person.

Godsall v. *Boldero.* 9 E. R. 72

INTEREST.

1. Where a bill indorsed over is not duly paid, the indorsee may charge the indorser with interest, exchange, and other incidental expenses beyond the amount of 5*l. per cent.* if such charges are reasonable, warranted by usage, and not made a colour of for usury.

Auriol v. *Thomas.* 2 T. R. 52

2. Upon a motion to refer it to the master to compute principal, interest and costs upon a bill of exchange drawn in *Scotland* upon and accepted by the defendant in *England;* the court will not direct the master to allow re-exchange.

Napier v. *Schneider.* 12 E. R. 420

3. The charge of 10*s. per* pagoda on a bill returned protested from *India* is not excessive, though it was taken in payment here at the rate of 6*s.* 6*d. per* pagoda. 2 T. R. 52

4. A bond is given by *A.*, *B.*, and *C.*, to *D.*, reciting "that *A.* having received from *D.* a certain sum of money in the *East Indies,* had drawn bills of exchange there payable to *D.* on a house in *England;* and that the obligors had agreed with *D.* that, if the bills should not be accepted and paid, they would pay the amount thereof, with *interest, from the day of their respective dates, by way of penalty;*" with a condition to be void if the bills should be accepted and paid according to the tenor thereof. On non-payment of the bills, *D.* is entitled to recover no more than the amount of them with *interest from the time of their becoming due.*

Orr v. *Churchill.* 1 H. B. 227

5. In debt upon recognizance, bail in error in the Exchequer Chamber are not liable to pay interest on the judgment between the signing of the judgment in *B. R.*, and the affirmance of it in *Cam. Scac.*

Frith and *Leroux.* 2 T. R. 57

6. But when the judgment is affirmed, it then becomes the debt of the bail; and if an action be brought against them on that judgment, the jury may give interest as damages for the detention of the debt. 2 T. R. 57

7. And if an action of debt be brought on a judgment, which was affirmed in error, against *the party* himself, the jury by way of damages may give interest upon the sum recovered by the judgment from the time of signing it, where by the practice of the court in which error is brought such interest is not allowed in costs upon the affirmance. *Entwistle* v. *Shepherd.* 2T.R.78

8. The court will not direct the master to include interest in the costs to be taxed on nonprossing a writ of error returnable in parliament for want of transcribing.

Cumming v. *Hanforth.* 2T.R. 58

9. In trover for bills of exchange, the Court of Exchequer-Chamber, allowed interest from the date of the final judgment upon all such bills as had been received before the judgment, and upon all such as had been received afterwards from the time of the receipt. *Atkins & al.* v. *Wheeler & al. (in error.)* 2 N. R. 205

10. Upon affirmance of a judgment for the plaintiff in an action for not performing a contract the Exchequer-Chamber refused to allow interest.

Bristow & al. v. *Waddington & al. (in error.)* 2 N. R. 360

11. Debt will lie for interest of money; *Semb. Herries* v. *Jamieson.* 5T.R. 553

12. In an action for money had and received, the plaintiff can recover only the net sum received, without interest.

Walker v. *Constable.* 1 B. & P. 306
Tappenden v. *Randall.* 2 B. & P. 467
(And see 2 B. & P. 467. tit. WAGER.)

13. Proceedings on a single bond were stayed by the Court of C. P. on payment by the obligor of principal and costs without interest. *Hogan* v. *Page.* (See BOND IV.) 1 B. & P. 337

14. In assumpsit for work and labour and money paid, the jury may in their verdict calculate interest on the money really advanced, but not on the damages for the work and labour.

Trelawney v. *Thomas.* 1 H. B. 303

15. Where the defendant, by a note in writing undertook to be answerable for goods to be furnished to a third person; the note specifying the time of credit to be allowed the vendor, was held to be entitled to interest on the price from the expiration of that time.

Mountford v. *Willes.* B. & P. 337

16. Execution cannot be taken out for interest upon a sum awarded to be paid on a particular day, and for which sum judgment was entered up. But it is in the province of the jury (or the arbitrator interposed in their place) to allow interest or not in the damages.

Lee v. *Lingard.* 1 E. R. 401

17. Though an agreement for the sale of goods which were afterwards delivered, give a certain day of payment for the price, interest does not run upon the sum due from that day.

Gordon v. *Swan.* 12 E. R. 419

18. But where goods are sold and delivered upon an agreement by the vendee to pay for them by a bill at a certain date; as interest would have run upon such bill, if given, it may be recovered in an action for the price of the goods brought after the time when such bill would have become due; and it may be recovered as part of the estimated value of the goods upon the common count for goods sold and delivered. *Marshall & al.* v. *Poole & al.* 13 E. R. 98

JOINDER IN ACTION, AND JOINT ACTION.

1. Where the same plea may be pleaded, and the same judgment given on two counts, they may be joined in the same declaration.

Brown v. *Dixon.* 1 T. R. 274

2. An action for debauching the plaintiff's daughter *per quod servitium amisit*, is an action of trespass, and a count thereon may be joined with a count for breaking and entering the house.

Woodward v. *Walton.* 2 N. R. 476

3. The first count of a declaration being in trover for bills of exchange, and the second and third counts stating the delivery of the bills to the defendant in order that he might get them discounted for a certain commission, and his having got them discounted, and converting the money to his own use; the defendant demurred generally on the ground of a misjoinder of tort and contract; but the court held that on a general demurrer, as all the counts were in the *form* of tort, judgment must be for the plaintiff if any one count was good.

Judin v. *Samuel.* 1 N. R. 43

4. Affirmed in K. B. *Samuel* v. *Judin. (in error.)* 6 E. R. 333

5. The assignees of *A.* a bankrupt, and also of *B.* a bankrupt, under separate commissions, cannot recover in the same action a *joint* debt due from the defendant to both the bankrupts, and

also *separate debts due to each;* and if in such an action the jury have assessed the damages severally on the separate counts, the Court will arrest the judgment on those counts, which demand the debts due to each bankrupt *separately*. *Hancock* v. *Haywood*. 3 T. R. 433

6. But where the plaintiffs sued as assignees of *A* and *B. and also* as assignees of *C.*, for a joint demand as due to all the bankrupts, the declaration was held good on a motion in arrest of judgment.
Streatfield v. *Halliday*. 3 T. R. 779

7. A solvent partner may join with the assignees of his two bankrupt partners in maintaining an action for money had and received to recover back from a creditor the amount of a bill, the joint property of the firm received by him from the acceptor by the indorsement of the two other partners after acts of bankruptcy committed by them.
Thomason & al. v. *Frere* 1 E. R. 418

8. *A. B.* and *C.* having been appointed assignees under a commission of bankrupt, and having acted as such, *A.* and *B.* pay each half of his bill to the solicitor; held, that *A.* and *B.* could not maintain a joint action against *C.* for his proportion of the money paid, but must each bring a separate action.
Brand & al. v. *Boulcott*. 3 B.&P. 235

9. Where bail call together upon an attorney and employ him to surrender their principal, *one* of them cannot afterwards maintain a *separate* action against such attorney for neglecting to effect the surrender pursuant to his undertaking. *Hill* v. *Tucker*. 1 W.P.T. 7

10. *A.*, *B.*, and *C.*, having dissolved partnership, *C.* after such dissolution, drew bills in the partnership firm in favour of *D.*, he not knowing of such dissolution; upon which *D.* brought his action against all the former partners; and *C.* having pleaded his bankruptcy, *D.* entered a *noli prosequi* as to him, and recovered judgment against *A.* and *B.* which was afterwards satisfied by the attorney of *A.* and *B.*, who advanced part, and borrowed the rest of the money on their *joint* credit; held that the sum so paid in satisfaction of the judgment might be recovered in a *joint* action by *A.* and *B.* against *C.* *Osborne & al.* v. *Harper*. 5 E. R. 225

11. A count for money had and received by defendant *to the use of the executor, as such*, may be joined to a count for money had and received *to the use of the testator*.
Petrie v. *Hannay*. 3 T. R. 659

12. But a plaintiff cannot join in the same declaration a cause of action as executor with another which accrued in his own right. 3 T. R. 659:—and
Cockerill & Ux. Executrix, &c. v *Kynaston*. 4 T. R. 277

13. A count on a promise made *by* defendant as administrator to pay money received by him as such to the plaintiff's use cannot be joined with other counts on promises made by the intestate. *Jennings* v. *Newman*. 4 T. R. 347

14. A count in assumpsit to the plaintiff, *as executrix*, for money *paid* by her to the defendant's use, may be joined with another count on promises made to the testator: for, *non constat* but that she may have been compelled to pay the money upon an obligation by the testator as surety for the defendant to a creditor; in which case the law would raise an assumpsit in him to reimburse the testator's estate, and the money so recovered by the executrix would be assets. *Ord* v. *Fenwick, Executrix (in error.)* 3 E. R. 104

15. The three first counts of a declaration in assumpsit against executors stated promises made by the testator, the fourth was for money had and received by the defendants "as such executors as aforesaid," stating a promise to pay by them "executors as aforesaid," and the last was upon a count stated by the defendants "executors as aforesaid," and stating the promise to pay in the same manner; held bad upon general demurrer.
Brigdon v. *Parke, Exrs.* 2 B.&P. 424

16. An executor cannot join a count upon a bond given to his testator, and a count upon a bond given to himself as executor, in the same action.
Hosier v. *Lord Arundel*. 2 P & P. 7

17. A count upon an account stated with the plaintiff, *executrix*, &c. (not saying *as executrix*, &c.) cannot be joined with counts on promises to the testator; for it is no allegation that the promises were made to the plaintiff in her representative capacity; and under such a count proof might be given of an account stated with her in her individual character. *Qu.* Whether, if it had been laid to be on an account stated with the plaintiff herself, though named *as executrix*, &c. it could be so

joined, as the cause of action would still appear to have arisen in the time of the executrix, though the money, when recovered, would be assets.

Henshall v. *Roberts (in err.)* 5 E.R. 150

18. A count upon a promise to the plaintiff *as administratrix* for goods sold and delivered by her after the death of the intestate, may be joined with a count upon an account stated with her as *administratrix*; for the damages and costs, when recovered, would be assets. *Cowell & Ux. Administratrix* v. *Watts.* 6 E. R. 405

19. A count on an *insimul computasset* with the plaintiff as executor, may be joined with a count for goods sold by the testator. *Thompson & Ux. Executrix* v. *Stent.* 1 W. P. T. 322

20. The criterion whether the counts are misjoined, is, whether the money, if recovered, will be assets or not, in the hands of the executor.

1 W. P. T. 322

ISSUE.

1. The word "issue" includes descendants in the most remote degrees.

Haydon v. *Wiltshere.* 3 T. R. 373

2. A bond given by a father on the marriage of his daughter, was conditioned for payment of interest of a certain sum to the husband, or his executors, during the obligor's life, and also for payment of the principal to the husband or his executors, within a limited time after the obligor's death, if any of the *issue* of the body of his daughter should be living at that time; there were children of the marriage, who all died before the obligor, *leaving grandchildren*: the grand-children were deemed to be *issue* of the body, &c. within the meaning of the condition; and consequently the husband's executors were entitled to recover on the bond. 3 T. R. 373

JUDGMENT.

I. *Priority.*

Where two judgments are signed on the same day, the priority of one cannot be averred.

Ld. Porchester v. *Petrie.* 1 T. R. 118

II. *Of Nonsuit.*

1. Judgment as in case of a nonsuit cannot be entered on the plaintiff's neglecting to carry the record down to trial, where the defendant might have carried it down by proviso.

King v. *Pippett.* 1 T. R. 492

2. The court will not give judgment as in a case of a nonsuit, in replevin, under statute 14 *G.* 2. *c.* 17.

Jones v. *Concannon.* 3 T. R. 661

3. Judgment as in case of a nonsuit may be entered up against the demandant in a writ of right; nor will the court relieve him if he has conducted himself unfairly towards the tenant in the course of the proceedings. *Almgill & Ux.* v. *Piereon & al.* 1 B. & P. 103

5. The rule, requiring a term's notice of proceeding, does not extend to a motion for judgment as in case of a nonsuit.

Doe d. Phillips v. *Moses.* 5 T. R. 634

6. Where the plaintiff in ejectment is nonsuited at the trial for want of the defendant's confessing lease, entry, and ouster, he is not entitled to sign judgment against the casual ejector till the *postea* comes in on the day in Bank.

Doe v. *Copeland.* 2 T. R. 779

7. The plaintiff in a *qui tam* action on stat. 7 *G.* 2. *c.* 8. withdrew his record, because the broker who negociated the illegal contract for stock refused to give evidence for fear of subjecting himself to a penalty on the same act; this was holden to be a sufficient reason for discharging a rule for judgment as in case of a nonsuit for not proceeding to trial, though the witness's liability to be sued would not be removed until after the three succeeding terms. *Raynes q. t.* v. *Spicer & v. Salomons.* 7 T.R. 178

8. The Court of C. P. will make the payment of costs, for not proceeding to trial, one of the terms for discharging a rule for judgment as in case of a nonsuit. *Jolliffe* v. *Morris.* 1 B.& P. 38

9. If the plaintiff shew on his declaration in debt on bond against two, that the bond is executed by three, it is good matter of plea in abatement; or in arrest of judgment; but is no ground of nonsuit on the plea of *non est factum.* *Tanner* v. *Jones.* 2 W.P.T. 254

III. *Arresting.*

1. If some counts in a declaration are good and some bad, and general damages are given, the court will arrest the judgment *in toto*, and will not award a *venire de novo.*

Holt v. *Scholefield.* 6 T.R. 691

2. *A.* having declared on a promissory note against *B.* made by *C.* to *A.*, by him indorsed to *B.*, and by him again indorsed to *A.*, and having obtained a verdict, the judgment was arrested on the ground of a circuity of action.
Bishop v. *Hayward.* 4 T. R. 470

3. Where in an action of *assumpsit* on a bill of exchange with the usual money counts, the defendant pleads *nil debet* to the count on the bill, but does not plead at all to the other counts, after a verdict for the plaintiff, the defendant shall not take advantage of his own mispleading in arrest of judgment.
Harvey v. *Richards.* 1 H. B. 644

IV. *On Warrants of Attorney.*

1. If a plaintiff enter up judgment in debt *on a mutuatus*, on a warrant of attorney to enter up judgment *in debt on bond*, the Court of B. R. will set it aside as irregular.
Paris v. *Wilkinson.* 8 T. R. 153

2. Where judgment has not been entered within a year and a day, on a warrant of attorney given with a *post obit bond*, and the obligee does not apply to the court for leave to enter it, till after the death of the person on whose death it is payable, the court will not grant leave, without a rule to shew cause.
Lushington v. *Waller.* 1 H. B. 94

3. A warrant of attorney to enter up judgment having been given to one (not naming his executors and administrators) who died in vacation, the court refused to enter up judgment thereon in the succeeding term on the prayer of his executrix. *Cowie (Executrix)* v. *Allaway.* 8 T. R. 257

4. The Court refused to allow judgment to be entered on an old warrant of attorney, it appearing by the Plaintiff's affidavit that she was resident in an enemy's country.
De Luneville v. *Phillips.* 2 N. R. 97

5. It is not necessary that the warrant of attorney should be read over to the party giving it (notwithstanding an old rule of court (in C. P.)
Taylor v. *Parkinson.* 2 H. B. 383

6. If *A.* acknowledge that an old warrant of attorney given by him, "was to enable *B.*, if necessary, to enter up judgment upon it." a judge may well make an order for entering up the judgment without an affidavit of the subscribing witness. *Laing* v. *Raine.* 2 B. & P. 85

7. No judgment can be signed upon any warrant authorising any attorney to confess judgment without such warrant being delivered to, and filed by the clerk of the docquets; who is to file the same in the order in which they are received, *Reg. Gen. K. B. M.* 42 *G.* 3. 2 E. R. 136. *C. P. M.* 43 *G.* 3. 3 B. & P. 310

8. Every attorney who shall prepare any warrant of attorney to confess any judgment which is to be subject to any defeasance, must cause such defeasance to be written on the same paper or parchment on which the warrant of attorney is written or cause a memorandum in writing to be made on such warrant, containing the substance and effect of such defeasance. *ib.* & *ib.*

JURISDICTION.

1. Where it appears that the court have no jurisdiction, they will not go into the merits. 2 T. R. 644

2. Proceedings in an action stayed, it being sworn by the defendant, and not denied by the plaintiff, that the debt was under 40*s.*
Wellington v. *Arters.* 5 T. R. 64

3. If it appear to the court that the debt sued for is under 40*s.* they will, on motion, stay the proceedings before trial. *Kennard* v. *Jones.* 4 T. R. 495 (But see tit. INFERIOR COURT.)

4. Where the original demand by assignees of a bankrupt was above 40*s.* but the jury found a verdict under 40*s.* the Court of C. P. gave leave to enter a suggestion under stat. 22 *G.* 2. *c.* 47. (the *Southwark* Court of Conscience Act) though it was urged that a Court of Conscience has no authority to try a question of bankruptcy.
Keay & al. v. *Rigg.* 1 B. & P. 11

5. But that court refused to allow a suggestion for double costs under stat. 23 *G.* 2. *c.* 33. (the *Middlesex* County Court Act) where the original debt being above 40*s.* had by a balance of accounts been reduced below that sum. And *Eyre* C. J. said, that it seemed to him that the original demand ought to be under 40*s.*
M Collam v. *Carr.* 1 B. & P. 223

6. An action for use and occupation may be brought in the County Court of *Middlesex.*
Parker v. *Vaughan.* 2 B. & P. 29

7. The jurisdiction of a Court of Conscience cannot by any fiction be extended to contracts made on the high seas. 1 B. & P. 223

8. The jurisdiction of the superior courts at *Westminster* cannot be ousted but by express words or necessary implication. *Cates q. t.* v. *Knight; The Same* v. *Mellish.* 3 T. R. 442

9. Mutual covenants in a deed, that in case of dispute they shall be referred to arbitration, do not oust the courts of law or equity of their jurisdiction. 8 T. R. 130

10. Neither the Court of K. B. nor C. P. have jurisdiction to discharge a defendant on common bail on the ground of the plaintiff's being an assignee under a commission of bankruptcy against the defendant, even though he has received dividends under the commission. *Hill* v. *Reeves.* 1 B. & P. 424: *Oliver & al.* v. *Ames.* 8 T. R. 364

11. But the Court of K. B. suspended a rule on the sheriff to bring in the body, in order to give defendant time to apply to the Chancellor for relief. 8 T. R. 365

12. The Court of C. P. declared that they had no jurisdiction to discharge a defendant out of execution on the ground of a commission of bankruptcy being *afterwards* sued out against him by the plaintiff; leaving it to the Court of Chancery either to supersede the commission, or direct the bankrupt to be discharged.
M'Master v. *Kell.* 1 B. & P. 302

13. Nor where the commission had been sued out previously to the arrest.
Percy v. *Powell.* 3 B. & P. 6

14. By charter the mayor and some of the aldermen of *London* have jurisdiction in *Southwark*, but as the charter contains no *non-intromittant* clause as to the justices of the county of *Surrey*, the latter have a concurrent jurisdiction with the former.
R. v. *Sainsbury.* 4 T. R. 451

15. The stat. 1 *Jac.* 1. *c.* 22. gives certain penalties, to be recovered (by § 46.) by action of debt or information in the courts of *Westminster*; the 50th sect. gives jurisdiction to the justices of assize, of gaol delivery, and of the peace, *to inquire* of the premises *and to hear and determine* the same; under the latter clause the inferior courts can only proceed by *indictment* or presentment.
Shipman q. t. v. *Henbest.* 4 T. R. 109

16. The informer may bring an action of debt upon this statute in the courts of *Westminster*, notwithstanding stat. 21 *Jac.* 1. *c.* 4. 4 T. R. 109

17. The statute 21 *Jac.* 1 *c.* 4. only restrains the proceedings on penal statutes in the superior courts, where the informer, before the passing of that statute, might have sued in the inferior as well as the superior courts by action, bill, plaint, suit, or information. 4 T. R. 109

18. But though the 4th sect. of the stat. 21 *Jac.* 1. *c.* 4. enables a defendant to plead the general issue, and give the special matter in evidence, yet he cannot avail himself under such plea of any matter which goes to the jurisdiction of the court. *ib.*

19. The stat 4 *G.* 3. *c.* 90. having enacted, that until a poor-house should be built for the hundred of *L.* and *C.*, the poor should continue under the government and management of the overseers of the poor, and after that time under the government and management of the guardians of the poor appointed by that act: it was held that, after the poor-house was built, the overseers of the poor and county magistrates had no authority in this district as far as respected the poor, and consequently that the overseers could not obey an order of justices made for the relief of a poor person within it.
R. v. *Keer & Rich.* 5 T. R. 159

20. The statute 25 *G.* 3. *c.* 51. having created penalties of 50*l.* and of 10*l.* and having enacted that the former should be sued for in any of courts at *Westminster*, and provided that it should and might be lawful for justices of the peace, &c. to hear and determine the latter, with a power to them to mitigate the penalties, &c. it was held that such proviso ousted the jurisdiction of the superior courts, as to the 10*l.* penalties. 3 T. R. 442

21. The meaning of § 74. of stat. 28. *G.* 3. *c.* 38. (relative to the exportation of wool) which enacts that any information upon it shall be tried by a jury, to be *summoned out of another county* than that were the fact was committed, is that the *trial shall be had in another county.*
Dyer v. *Hainsworth.* 3 T. R. 611

22. And under § 31. the Court out of which the record issues is to give judgment, and not the Court of *Nisi Prius* where it is tried. 3 T. R. 611

23. Where the acts of commisioners appointed by a paving act occasion a damage to an individual, without any

excess of jurisdiction on their part, the commissioners, or paviors acting under them, are not liable to an action. *The Governor, &c. of the British Cast Plate Glass Manufacturers* v. *Meredith.* 4 T. R. 794

24. Where an inclosure act gave the commissioners power to set out and make roads, &c., and directed that the expenses of making and repairing those roads, and all other expenses, should be borne by the proprietors in certain proportions, to be ascertained by the commissioners in one general rate; and then gave an appeal to the rate on account of the commissioners having expended money on an improper object could not be tried in an action of trespass, but that the party aggrieved must appeal to the Sessions. *Bonnell* v. *Beighton, E.* 33 *G.* 3. 5 T. R. 182

25. Conusance of a plea of trespass sued against a resident member of the university of *Cambridge*, for a cause of action verified by affidavit to have arisen within the town and suburbs of *Cambridge*, over which the university court has jurisdiction, was allowed upon the claim of the vice-chancellor on behalf of the chancellor, masters, and scholars of the university, entered on the roll in due form, setting out their jurisdiction under charters confirmed by act of parliament, and averring the cause of action to have arisen within such jurisdiction. *Brown* v. *Renouard, Clk.* 12 E.R. 12

JURY, AND JUROR.

1. Affidavit of a *juror*, that the jury having been divided, tossed up, and that the plaintiff had won, rejected: for such conduct is a very high misdemeanor in the juror himself; and the information must come from some other source, such as from some person who had seen the transaction through a window, or the like. *Vasie* v. *Delaval.* 1 T. R. 11

2. So the Court of C. P., after consultation with the other judges, rejected an application to set aside a verdict on the affidavit of a juryman that it was decided by lot. *Owen* v. *Warburton.* N. R. 326

3. The Court will not, at a distance of time after the trial, amend the *postea*, by increasing the damages given by the jury, although all the jurymen join in an affidavit, stating their intention to have been to give the plaintiff such increased damages, and that they conceived that the verdict they had given was calculated to give him such sum. *Jackson* v. *Williamson.* 2 T. R. 28

4. The proper time for explanations of that sort is at the trial. 2 T. R. 812

5. If after a special jury has been struck, the cause goes off for default of jurors, no new jury can be struck, but the cause must be tried by the jury first appointed. *R.* v. *Perry.* 4 T. R. 453

6. The son of a juryman summoned and returned, having answered to his father's name when called on the pannel, and served as one of the jury on the trial of a cause, is not of itself a sufficient ground for setting aside the verdict as for a mis-trial. *Hill* v. *Yates,* 12 E. R. 229

See *Curry's case, cited* p. 231 from the book of Crown cases in the possession of the Ch. J. for the time being.

7. A custom to swear the jurors at *one* court leet to inquire, and return their presentment at the *next* court, is bad in law. *Davidson* v. *Moscrop.* 2 E. R. 56

JUSTICES OF PEACE.

I. *How protected in the Exercise of their Duty;*—(and see *post* III. 1, 2.

1. Wherever justices of the peace act uprightly, though they mistake the law, no information will be granted against them. *R.* v *Jackson.* 1 T. R. 653

2. An information will be granted against a justice of the peace as well for granting as for refusing an ale licence improperly. *R.* v. *Holland.* 1 T. R. 692

3. If there be any evidence tending to prove an offence, over which a magistrate has a summary jurisdiction by conviction, the Court of K. B. cannot judge of the degree of it, or control the determination of the magistrate upon that evidence. 6 T.R. 177

4. If justices of the peace acquit a defendant against whom an information is laid before them for a penalty, this court cannot reverse the judgment, though the justices state (on a return to a *certiorari* to remove the proceedings here) evidence which *prima facie*, is sufficient to convict, and no contradictory or explanatory evidence. *R.* v. *Reason.* 6 T. R. 375

5. A commitment by a justice of peace for a time certain, as for 14 days, under the vagrant act, is a commitment in execution, and the party is not en-

titled to be bailed: and if another magistrate, on illegal and corrupt motives, discharge a person so committed, the court will grant an information against him.

R. v. *R. Brooke.* 2 T. R. 190

6. Where magistrates are to execute a *judicial fact*, they must meet and execute it together. Therefore an appointment of overseers by two justices *separately*, is bad.

R. v. *Forrest.* 3 T. R. 38, 380

(See POOR; OVERSEERS.)

7. So is an indenture of a parish apprentice. See tit. POOR (SETTLEMENT) I. 4. And an order of removal, or of filiation. *R.* v. *Hampstall Ridgware (Inhabitants).* 3 T. R. 380

8. After an appointment of four overseers, for a parish by the magistrates at one meeting, they are *juncti officio*, and no other magistrates can discharge one of the persons so appointed though by his desire, and appoint another; but the party must appeal to the sessions to get his discharge. *R.* v. *Great Marlow (Inhab.)* 2 E. R. 244

9. *Semble*, the magistrates making the appointment must be together at the time. *ib.*

10. An order of removal, signed by two justices separately and in different counties, is only voidable, not void: and the parish wishing to avoid it must appeal to the next sessions.

R. v. *Stotford (Inhab.)* 4 T. R. 596

11. But where the justices act *ministerially*, as in allowing a poor-rate, they may act separately. 3 T. R. 381, 2

12. No action can be brought against a justice of the peace for any act done by him in that character without giving him a month's notice of the precise *writ* or *process* intended to be sued out as well as of *the cause of action*.

Lorelace v. *Curry.* 7 T. R. 631

13. Notice of *an action on the case for false imprisonment and assault* was held not sufficient to support *an action of trespass and false imprisonment*. *Per Yates*, J. *Strickland* v. *Ward, Winchest. Summ. Ass.* 1767 7 T. R. 631, *n.*

14. The lord of a manor, who is also a justice of the peace, is entitled to a month's notice of an action brought against him for taking away a gun in the house of a person unqualified to kill game, by the stat. 24 *G.* 2. *c.* 44. for it will be presumed that he acted as a justice.

Biggs v. *Evelyn, (Bt.)* 2 H. B. 214

15. *One* magistrate committing the mother of a bastard child to custody for not filiating the child, is yet entitled to the previous notice of action required by the stat. 24 *G.* 3. *c.* 44., though by the stat. 18 *Eliz. c.* 3. § 2. jurisdiction over the subject matter is given to *two* magistrates.

Weller v. *Toke.* 9 E. R. 364

16. The stat. 43 *G.* 3. 141. does in no instance extend to protect justices of peace in the execution of their office against actions for acts of trespass or imprisonment, unless done on account of some *conviction* made by them of the plaintiffs in such actions by virtue of any statute, &c.

Massey v. *Johnson.* 12 E. R. 67

II. *Commitments by.*

1. Whether justices of the peace have not the power of committing a pauper for refusing to answer questions relative to his settlement? 1 T. R. 653

2. Under stat. 10 *G.* 3. *c.* 44. § 7. a justice of the peace, after convicting a hackney coachman for refusing to go with his coach, may immediately commit him to the house of correction if he do not pay the penalty.

Duck v. *Addington.* 4 T. R. 447

3. The practice of one magistrate's granting a *supersedeas* to the warrant of another without any formal and legal examination is unwarrantable.

R. v. *R. Brooke.* 2 T. R. 190

4. A commitment in execution by a magistrate must state that the party has been *convicted:* setting forth that he was charged on oath with the offence is insufficient. *R.* v. *T. Cooper.* 6 T. R. 509

5. A commitment in execution of a rogue and vagabond under stat. 23 *G.* 3. *c.* 88. should state that the defendant was apprehended with the implements of housebreaking upon him *at the time of such apprehension.*

R. v. *J. Brown.* 8 T. R. 26

III. *Orders of.*

(And see MANDAMUS I.; POOR (REMOVAL) II. & III.; POOR (SETTLEMENT) III.; and 1 E. R. 64. tit. WAY.)

1. The Court of *B. R.* will intend every thing in an order of justices to be right, unless the contrary appear. *R.* v. *Aire and Calder Navigation.* 2 T. R. 666

2. Every reasonable intendment will be made in favour of an order of justices. Therefore where an order of bastardy, reciting that it had appeared to the

justices on the oath of *R. T.* that the *said Mary Cole* (referring to the title in which she was named as *Mary Cole deceased)* was delivered of a bastard child, &c.; and *further*, that *upon the examination* of the said *M. C.* taken on oath, &c. *dated*, &c. in the presence of the said *R. T.*, the said *M. C.* upon her oath charged the defendant with being the father, &c. adjudged that therefore upon examination of the cause and circumstances of the premises, *as well on the oath of the said* M. C. before birth so taken, and *also* upon the *oath of the said* R. T., that the defendant was the father, and that he should pay so much, &c.; the court will intend (especially after appeal confirming the order) that *M. C* was dead at the time of the order made, and that her examination on oath before taken in writing under the statute 6 *G.* 2. *c.* 31. was verified on the oath of *R. T.* before the magistrates making the order; which examination is sufficient after the death of the mother to warrant a subsequent order of filiation. *R.* v. *Clayton*. 3 E. R. 58

2 *a.* The Court of *B. R.* will not go into any question not intended to be referred to them by a case stated at the court of quarter sessions, on an appeal against an order of justices. 2 T R. 666

3. It must appear on an order made by a justice that he had jurisdiction to make it, otherwise it is void.
R. v. *Hulcott (Inhab.)*. 6 T. R. 583

4. An order of two justices founded on the statute 5 *G.* 1. *c.* 8. (for providing for the families of absconding men out of their estates) should state *how much* of the goods or rents of the fugitive should be seized by the parish officers, and the subsequent order of confirmation by the Sessions should specify the *quantum* of relief to be appropriated out of the goods and rents so seized, and limit a period for such appropriation; supposing such *prospective* order to be good, and that the order is not to be confined to the discharge of expenses already incurred by the parish.
Stable v. *Dixon*. 6 E. R. 16.

5. And *quære*, if the original order be defective in the particular mentioned, whether the Sessions can make it good by an order of confirmation directing the parish officers "to receive 7*l.* 15*s.* *rent of the rents and profits*, &c. towards the *discharge* of the parish for providing for the party's wife, &c. *ib*

6. But, at any rate, a payment of one sum of 7*l.* 16*s.* is a sufficient compliance with such order, on the only ground of construction on which it can be supported. And the tenant in whose hands the rent was seized, cannot justify in covenant by his landlord for rent in arrear, the retaining a second sum of 7*l.* 16*s.* out of the second year's rent upon the supposition that such order of sessions extended to enable the parish officers to receive so much *annually* out of the rents; for in that view the order would be bad in law upon the face of it, as an indefinite order for the annual payment of such a sum, without any limitation of time, or until further order. *ib.*

7. If it do not distinctly appear on an order of removal, that the justices who made it had jurisdiction, it is a nullity, and not merely voidable: and the parish to which it is directed may object to it at any distance of time, though they never appealed against it, and and though they have acted under it for 20 years.
R. v. *Chilverscoton Inhab.* 8 T.R. 178

8. Where two counties have been mentioned in the antecedent part of an order of removal, the justices making the order must state themselves to be justices of the proper county; and it is not enough to describe themselves justices of the peace in and for the *said county*, although the proper county were named in the margin, and were also named last before such description of the justices. *R.* v. *Moor Critchell, (Inhab.)* 2 E. R. 66

9. An order of removal signed by two justices separately, and in different counties, is only voidable, not void: and the parish wishing to avoid it must appeal to the next Sessions.
R. v. *Stotfold (Inhab.)* 4 T. R. 596

10. An order of a justice for discharging a servant from her master's service under stat. 5 *Eliz. c.* 4. was held void, (and not merely voidable) because it did not appear on the order itself that she was a *servant in husbandry*.
6 T. R. 583

11. Whether the insanity of such a servant be a good cause for discharging her? *Qu.* [See POOR (SUPPLEMENT) V.] 6 T. R. 583

12. An order for reimbursement under stat. 33 *G.* 3. *c.* 8. § 5. made upon the parish for which a substitute in the militia serves, to indemnify the

parish in which such substitute's family shall have become chargeable and been relieved under an order of maintenance, must be made by the same magistrate and at the same time as the first order of maintenance; and notice of such order of reimbursement ought to be served upon the parish to be affected by it before they can be proceeded against criminally for disobedience to it.

R. v. *Ludbury (Inhab.)* 7 T. R. 585

13. In an order of filiation and maintenance, the justices have no power by the stat. 18 *Eliz. c.* 3. to direct the defendant to pay the *costs* of the parish in obtaining the order; but having in such order separated the sum to be paid for maintenance, and the sum to be paid for costs, the order was quashed as to the latter, and confirmed as to the rest of it.

R. v. *Sweet.* 9 E. R. 25

14. One who is *de facto* guardian of the poor of a parish united with other parishes under the statute 22 *G.* 3. *c.* 83 for the better relief and employment of the poor, and who is received and acknowledged by the parish as guardian, though not legally appointed under the statute, is yet competent to apply in that character to a justice of the peace to take the examination of a single woman with child in order to filiate the bastard; which by the stat. 6. *Geo.* 2. *c.* 31. § 1 is directed to be made upon application by the overseers of the poor, in whose place such guardian is appointed, and he is also competent to apply to the justice for a summons against a reputed father for not obeying an order of bastardy; which by stat. 49. *Geo.* 3. *c.* 68. § 3. is directed to be made upon complaint by any one of the overseers of the poor. And though the latter statute direct the magistrate, upon such complaint and proof upon oath of the order for payment of maintenance, and nonpayment thereof, to issue his warrant to apprehend the reputed father; yet it is proper for the justice to issue a summons in the first instance to the party charged, to attend and shew cause &c.

R. v. *Martyr & al.* 13 E. R. 55

K.

KING'S BENCH PRISON.

1. All former Rules for establishing the rules of the KING'S BENCH PRISON repealed—The Rules of the KING'S BENCH PRISON to be in future comprised within the bounds following, *viz.*—From *Great Cumber Court* in the parish of *St. George the Martyr*, in the county of *Surrey*, along the north side of *Great Suffolk Street*, as far as the *Star* Brewhouse, and from thence along the north-west side of *Gilbert's Lane* to the *Blackfriars Road*, and across the said road along the north-west side of *Webber Street* to the *Half-Way House*, and from thence along the western side of *Barron's Buildings* and *St. George's Row* to the *Westminster* Road, and then across the said road and along the western side of *St. George's Mall*, and from the pastry-cook's at the west end thereof directly across to the lamp-post on the footpath near the watch house facing the *Dog and Duck*, and along the said footpath from the said lamp-post to another lamp-post on the eastern side of the said road facing *Key's* Nursery, and then along the whole of the said road leading by *Prospect Place* to the *Elephant and Castle*, and from thence along the eastern side of *Newington Causeway* to *Great Cumber Court* aforesaid; and *the House of Correction for the county of Surrey*, the New Gaol, *Southwark* and *the Gaol now building for the County of Surrey* and the highways, exclusive of the houses on each side thereof, leading from the KING'S BENCH PRISON to the said gaols respectively are within the said Rules; AND all taverns, victualling-houses, ale-houses, wine-vaults, houses or places licensed to sell gin or other spirituous liquors, *and all places licensed for public entertainments* are excluded out of the said rules.

Reg. Gen. E. 35 *G.* 3.

2. The parish of *St. George the Martyr* within the Borough of *Southwark* in the county of *Surrey*, and the churchyard adjoining thereto, declared to be within the said rules.

Reg. Gen. T. 36 *G.* 3.

3. No prisoner in the KING'S BENCH PRISON, or within the rules thereof,

shall have or be entitled to have day rules above three days in each term, And every such prisoner having a day rule shall return within the walls or rules of the said prison, at or before nine o'clock in the evening of the day for which such rule shall be granted.
Reg Gen. E. 30 *G.* 3. 3 T. R. 584

4. But a prisoner may, on shewing special cause, obtain additional day-rules.
Reg. Gen. M. 37 *G.* 3. 7 T. R. 82

5. The granting of day-rules to prisoners in the K. B. prison during term is in the discretion of the court on application, the same as before *East.* 30 *G.* 3.; but prisoners out upon such day-rules must return at or before nine o'clock in the evening.
Reg. Gen. H. 47 *G.* 3. 6 E. R. 2

L.

LANDLORD AND TENANT.

1. Where an infant becomes entitled to the reversion of an estate leased from year to year, he cannot eject the tenant without giving the same notice as the original lessor must have given. *Maddon* v. *White* 2 T. R. 159

2. If a tenant hold under an agreement for a lease at a yearly rent, whereby it is stipulated that the agreement shall continue for the life of the lessor, and that a clause shall be inserted in the lease, giving the lessor's son power to take the house for himself when he came of age, the son must make his election in a reasonable time after he comes of age.
Doe d. Bromfield v. *Smith.* 2T.R.436

3. The delay of a year is unreasonable, and tenant cannot be ejected upon a half-year's notice to quit, served after such a delay. 2 T. R. 436

4. If he had elected within a week or fortnight, that certainly would have been reasonable. 2 T. R. 436

5. Where a landlord has a right to reenter for non-payment of rent, he cannot recover in ejectment at common law, unless he demand the rent on the day when it becomes due; nor under the stat. 4 *G.* 2. *c.* 28. § 2., if there be a sufficient distress on the premises.
Doe d. Forster v. *Wandlass.* 7T.R. 117

6. A tenant to a mortgagor, who does not give him notice of an ejectment brought by the mortgagee to enforce an attornment, is not liable to the penalties of stat. 11 *G.* 2. *c.* 19. § 12. for secreting ejectments.
Buckley v. *Buckley* 1 T. R. 647

7. Tenant in tail having received an ancient rent of 1*l.* 18*s.* 6*d.* from the lessor in possession, under a void lease granted by tenant for life, under a power, the rack-rent value of which was 30*l.* a year, cannot maintain an ejectment, laying his demise at least on a prior day, without giving the lessee some notice to quit, so as to make him a trespasser after such recognition of a lawful possession either in the relation of tenant, or at least continuing by sufferance till notice
Denn d. Burne (Clk) v. *Rawlins.* 10 E. R. 261

II. *Notice to quit.*

1. Where the term of a lease is to end on a precise day, there is no occasion for a notice to quit; because the lease is of course at an end, unless the parties come to a fresh agreement. 1 T. R. 54
Right d. Flower v. *Darby.* 1 T. R. 162

2. The landlord has a right to enter on the expiration of the term, though if he do it with a strong hand to dispossess the tenant by force he may be indicted. 7 T. R. 431

3. Where tenant for life grants a lease for years, which is void against the remainman, and the latter, before he elects to avoid it, receives rent from the tenant, whereby, a tenancy from year to year is created; this is with refert ence to the old term, and half a year's notice to quit from the remainderman ending with the old year is proper.
Roe d. Jordan v. *Ward.* 1 H. B. 97
(And see 7 T. R. 86: and 478)

4. If a tenant for life, under a limited power of leasing, grant a lease exceeding his power, the lease is void, and not capable of conformation by the remainderman man.—(See title POWER.)
But if the remainder-man accept rent, as rent, after the death of the tenant for life, it is an admission that the defend-

ant is his tenant, and then he is entitled to notice quit.
Doe d. Martin v. *Watts.* 7 T. R. 83

5. An estate, the greater part of which was in lease, either for years certain not exceeding 21, or for longer terms of years determinable on lives, was settled on several tenants for life in succession, with remainders in tail; with power to every tenant for life "who should be entitled to the freehold of the premises or any part "thereof, when he should be in the "actual possession of the same, or "any part thereof, from time to time "by indenture to make leases of all "or any part or parts of the demesne "lands, whereof he should be in the "actual possession as aforesaid, for "any term or number of years, not "exceeding 21 years, or for the life or "lives of any one, two, or three person or persons: *so as* no greater estate than for three lives be at any "one time in being in any part of the "premises; and so as the ancient "yearly rent, &c. be reserved," &c. the Court of Court of K. B. held 1st, that the power only authorized either a chattel lease, not exceeding 21 years or a freehold lease not exceeding three lives; and that a lease by tenant for life for 99 years determinable on lives, as it might exceed 21 years, was void at law, and was not even good *pro tanto* for the 21 years.
Roe d. Brune v. *Prideaux* 10 E. R. 158

5. But the special verdict finding that the tenant in tail had received the rent reserved by such lease, accruing after the death of the tenant for life who made it, and who had not given any notice to quit: held, 2dly, that the receipt of rent was evidence of a tenancy, the particular description of which it was for the jury to decide upon; and for the defect of the special verdict in this respect a *venire de novo* was awarded. But the court intimated, that under the circumstances of the case, and the disparity of the rent resevred, being 4*l.* 2*s.*, while the rack-rent value was 60*l.* a year; (though one of the lessees had been presented by the homage as tenant after the death of the tenant for life, and admitted by the lord's steward; and the 4*l.* 2*s.* reserved was more than the ancient rent); a jury would be strongly advised to decide against a tenancy from year to year. 10 E. R. 158

6. Where one in remainder, after the expiration of an estate for life, gave notice to the tenant to quit on a certain day, and afterwards accepted half a year's rent accrued due before the expiration of the notice to quit; such acceptance, being only evidence of a holding from year to year, is rebutted by the *previous* notice to quit; and therefore the notice remains good.
Sykes d. Murgatroyd & al. v. ——— *cor. Blackstone*, J. *York Sum Ass.* 1774. 1 T. R. 161, *n.*

7. But a distress taken for rent accrued after the expiration of a notice to quit, is a waiver of the notice to quit.
Zouch d. Ward v. *Willingale.* 1 H. B. 311

8. So if a landlord receive rent accrued due after *the expiration of a notice to quit* it is a waiver of that notice.
Goodright d. Charter. v. *Cordwent.* 6 T. R. 219
(And see *post* 14; and IV. 8.)

9. In the case of a tenancy from year to year, there must be *half a year's* notice to quit, ending at the expiration of the year. *Right d. Flower* v *Darby.* 1 T. R. 159

10. *Six months'* notice is not sufficient. *id.* 163

11. There is no distinction between houses and lands, as to the time of giving notice to quit. 1 T. R. 162, 3

12. It is said that three months' notice to quit lodgings is sufficient, *per* Lord *Mansfield* C. J. in *Throgmorton d. Woadby* v. *Whelpdale, B. R. H. 9 G. 3.* 6 E. R. 121, *n.*

13. On a letting of a house from year to year to quit at a quarter's notice the quarter must end with a year of the tenancy. *Doe d. Pitcher* v. *Donovan* 1 W. P. T. 555

14. If notice to quit at *Midsummer* be given to a tenant holding from *Michaelmas*, he may insist on the insufficiency of the notice at the trial of an ejectment, though he did not make any objection at the time it was served, but merely said, "I pay rent enough already, and it is hard to use me thus." *Oakapple* v. *Copous.* 4 T. R. 361

15. A notice delivered to a tenant at *Michaelmas* 1795, to quit at "*Lady day* which will be in the year 1795," was holden to be a good notice to quit at *Lady day* 1796. *Doe d. Duke of Bedford* v. *Knightley.* 7 T. R. 63.

14. A landlord gave a notice to quit different parts of a farm at different times which the defendant neglected to do in

part, in consequence of which the landlord commenced an ejectment: and before the last period mentioned in the notice was expired, the landlord fearing that the witness, by whom he was to prove the notice would die, gave another notice to quit at the respective times in the following year, but continued to proceed with his ejectment: held the second notice was no waiver of the first. *Doe d. Williams* v. *Humphrey*. 7 T. R. 237

(And see *ante* 5, 6, 7; and *post* IV. 8.)

17. Where a defendant in ejectment held as to the arable lands from *Candlemas* and as to the rest of the farm from *May day* the rent being payable at *Michaelmas* and *Lady-day*, and notice to quit was given six months before *May-day*, but not six months before *Candlemas*; Lord *Kenyon*, at *Stafford* Sum. Ass. 1788, non-suited the plaintiff. *Quere.* Whether the notice to quit were given half a year before *Lady-day? Doe d. Ld. Grey de Wilton* v. ———, cited in *Doe* v. *Calvert*. 2 E. R 384

18. Under an agreement by a tenant of a farm "to enter on the tillage land at *Candlemas*, and on the house and all other the premises at *Lady-day* following, and that when he left the farm he should quit the same *according to the times of entry as aforesaid*," and the rent was reserved half-yearly at *Michaelmas* and *Lady-day*; held that a notice to quit delivered half a year before *Lady-day*, but less than half a year before *Candlemas* was good; the taking being in substance from *Lady-day*, with a privilege for the incoming tenant to enter on the arable land at *Candlemas* for the sake of ploughing, &c.

Doe d. Strickland v. *Spence*. 6 E. R. 120

19. Under an agreement of demise, dated in *January*, of a dwelling-house, mills, and other buildings for the purpose of carrying on a manufacture, together with certain meadow, pasture, and bleaching grounds, watercourses, &c. for a term of 45 years, *to commence* as to the *meadow* ground *from the 25th of* December *last*: as to the pasture from the 25th of *March* next, and as to the *housing, mills, and all the rest of the premises*, from the first of *May*; reserving the *first year's rent* on the day of *Pentecost*, and the other half year's rent at *Martinmas*: held that the substantial subject of demise being the house and buildings for the purpose of the manufacture, which were to be entered on the 1st of *May*; that was the substantial time of entry to which a notice to quit ought to refer, and not to the 25th of *December*, when the incoming tenant had liberty of entering on the *meadow*, which was merely ancillary to the other and principal subject of demise; and consequently that a notice to quit served on the 28th of *Sept.* (which would have been sufficient with reference even to the 25th of *March*, the day of entering on the pasture ground; the 29th of *September* being the corresponding half yearly day of holding to the 25th of *March*) to quit *at the expiration of the current year of holding* was sufficient.

Doe d. Ld. Bradford v. *Watkins and another*. 7 E. R. 551

20. Where house and land are let together to be entered upon at different times: and it does not appear from the terms of the demise from what time the whole is to be taken as let together: it is a question of fact for the jury, which is the principal, and which the accessorial subject of demise, in order for the judge to decide whether the notice to quit the whole were given in time.

Doe d. Heapy v. *Howard*. 11 E. R. 498

21. If a landlord lease for seven years by parol, and agree that the tenant shall enter at *Lady-day* and quit at *Candlemas*, though the lease be void by the statute of frauds as to the duration of the term, the tenant holds under the terms of the lease in other respects; and therefore landlord can only put put an end to the tenancy at *Candlemas*.

Doe d. Rigge v. *Bell*. 5 T. R. 471

22. An agreement to lease at a certain rent, and that the lessor should not turn out the tenant *so long* as he paid the rent, and did not sell any article injurious to the lessor's business, either purports to be a lease for life, and would then be void, as not being creatable by parol; or if it operate as a tenancy from year to year, it must necessarily be determinable by either party giving the regular notice to quit. *Doe d. Lockwood* v. *Browne*, 8 E. R. 165

23. Tenant from year to year before a mortgage, or grant of the reversion, is entitled to six months' notice to quit

before the end of the year from the mortgage or grantee.

Birch v. *Wright*. 1 T. R. 380 & 382

19. Ejectment may be brought by a mortgagee, without giving notice to quit, against one who was let into possession as tenant from year to year by the mortgagor, after the mortgage made to the original mortgagee, but before the assignment of it to the lessor. *Thunder d. Weaver* v. *Belcher*. 3 E. R. 449

25. A landlord of premises about to sell them gave his tenant notice to quit on the 11th of October 1806, but promised not to turn him out unless they were sold: and not being sold till February, 1807, the tenant refused on demand to deliver up possession. And on ejectment brought; the Court of K. B. held that the promise (which was performed) was no waver of the notice, nor operated as a licence to be on the premises, otherwise than subject to the landlord's right of acting on such notice, if necessary; and therefore that the tenant, not having delivered up possession on demand after a sale, was a trespasser from the expiration of the notice to quit.

Whiteacre d. Boult v. *Symonds*. 10 E. R. 13

25. Lease of lands by deed, since the new style, to hold from the feast of *St. Michael*, must be taken to mean from *New Michaelmas*, and cannot be shewn by extrinsic evidence to refer to a holding from *Old Michaelmas*: and a notice to quit at *Old Michaelmas*, though given half a year before *New Michaelmas*, is bad. *Doe d. Spicer*, v. *Lea*. 11 E. R. 312

26. It seems that a receiver appointed by the Court of Chancery with a general authority to let the land to tenants from year to year, has also authority to determine such tenancies by a regular notice to quit.

Doe d. Marrack & al. v. *Read*. 12 E. R. 57

III. *Party-Wall.*

1. A lessee for 21 years at a pepper corn rent for the first half-year, and a rack-rent for the rest of the term, who by agreement was to put the premises in repair, and covenanted to pay the land-tax, and all other taxes, rates, assessments, and *impositions*, having assigned his term for a small sum in gross, was held not to be liable to pay the expense of a party-wall, either by the provisions of stat. 14 *G.* 3. *c.* 78. § 41. or by the covenant: but that charge must in such case be borne by the original landlord.

Southall v. *Leadbetter*. 3 T. R. 458

2. The statute 14 *G.* 3. *c.* 78. § 41. intended to throw that burden on persons to whom long leases had been granted with a view to *an improvement of the estate*, and who afterwards *underlet* at a considerable *increase of rent*. *ib.*

3. That the owner of the *improved* rent, not of the *ground* rent, is liable to pay the expenses of a party wall. See also *Peck* v. *Wood*. 5 T. R. 130

4. A lessee of such a term, who afterwards *sold the lease for a sum in gross*, would also be liable within this act. *Semb.* 3 T. R. 458

5. The lessor of a house at a rack-rent (there being no other person entitled to *any* kind of rent) is liable to contribute to the expenses of such party wall, though the lessee has improved the house demised.

Beardmore v. *Fox*. 8 T. R. 214

6. But if the lessee of a house at a rack-rent, underlet it at an advanced rent, he is liable to contribute to the expenses of such party-wall: nor is the operation of the statute at all varied by any covenants to repair, entered into between the landlord and his tenant.

Sangster v. *Birkhead*. 1 B. & P. 303

7. The tenant of a house covenanted in his lease to pay a reasonable share and proportion of supporting, repairing, and amending all party-walls &c. and to pay all taxes, duties or assessments and impositions, parliamentary and parochial, "it being the intention of the parties that the landlord should receive the clear yearly rent of 60*l.* in net money without any deduction whatever;" during the lease the proprietor of the adjoining house built a party-wall between that house and the house demised: Under the statute 14 *G.* 3. *c.* 78., held that the tenant (not the landlord) was bound to pay the moiety of the expense of the party-wall.

Barrett v. *Bedford (D.)* 8 T. R. 602

8. The three months' notice required by § 38. is only necessary where the person, who at the time when it is necessary to build, &c. is liable to pay, cannot agree with the owner of the adjoining house. 5 T. R. 130

9. Where notice of pulling down and rebuilding a party-wall was given under the building act 14 *G.* 3. *c.* 78., and the tenant of the adjoining house, who was under covenant to repair, finding it necessary, in consequence, to shore up his house, and to pull down and replace the wainscot and partitions of it, instead of leaving such expenses to be incurred and paid by the owner of the house giving notice, in the manner prescribed by the act, and afterwards paying the same to him upon demand, employed workmen of his own to do those necessary works, and paid them for the same: held that he could not recover over against his landlord such expenses incurred by his own orders, and paid for by him in the first instance; all the powers and authorities given by the act in respect of any works to be done, being given to the owner of the house intended to be pulled down and rebuilt, and the landlord of the adjoining house being only liable by the act to reimburse his tenant money paid by him to the other owner for such works as are authorized to be done by such other owner in respect of such adjoining house.

Robinson v. *Lewis.* 10 E. R. 227

10. Before an action can be brought on the building act to recover a proportion of the expenses of building a party wall, the accounts prescribed by § 41. must be delivered whether the house be occupied by the owner or by a tenant: and a formal demand of the money must be made 21 days before action brought.

Philip v. *Donati.* 2 W. P. T. 62

IV. *Rent and Double Rent.*

1. If both lessee and lessor sign a lease, the former is estopped to plead *nil habuit in tenementis* to an action of debt for rent by the lessor. *Wilkins* v. *Wingate.* 6 T. R. 63; and see *Parker* v. *Manning.* 7 T. R. 537

2. There may be a tenancy without an agreement for a cetain *quantum* of rent: that may be ascertained afterwards; or the lessor may recover on a *quantum meruit.* 4. E. R. 33

3. If a trader after committing an act of bankruptcy, take a house and agree to pay half a year's rent in advance, where, by the custom of the country, half a year's rent becomes due on the day on which the tenant enters, the landlord, after an assignment under the commission, and before the year expires, may distrain the goods on the premises for half a year's rent; or if he buy the tenant's goods at the sale under the commission, he may retain the amount of the half year's rent.

Buckley v. *Taylor.* 2 T. R. 600
(And see title BANKRUPT VIII.)

4. To an avowry for rent the tenant may plead payment of a ground-rent to the original landlord.

Sapsford v. *Fletcher.* 4 T. R. 511
(See title SET-OFF.)

5. If *A.* tenant for life subject to forfeiture, remainder over to *B.*, lease to *C.* for a term, and afterwards apprehending that he has forfeited, acquiesce in *B.*'s claiming and receiving the rent from *C.* his executor may, on shewing that he acquiesced under a false apprehension, recover from *C.* the amount of the rent erroneously paid to *B.*

Williams v. *Bartholomew.* 1 B. & P. 326

6. The goods of a tenant are liable for a year's rent, notwithstanding an outlawry in a *civil suit.* 7 T. R. 259

7. A sheriff's officer being in possession of the tenant's effects under an outlawry, made a distress for rent, sold the goods distrained, and afterwards the outlawry was reversed: held that the officer was liable to pay the produce of the goods to the landlord in an action for money had and received.

St. John's College, Oxford. v. *Murcot.* 7 T. R. 259

8. If, under an agreement for a lease at a certain rent, the tenant is let into possession before the lease executed, the lessee cannot during the first year distrain for rent, for there is no demise expressed or implied.

Hegan v. *Johnson.* 2 W. P. T. 148

9. If a landlord give notice to his tenant *to quit* at the expiration of the lease and the tenant hold over, the landlord is entitled to double rent; and a second notice delivered to the tenant after the expiration of such notice, *to quit on a subsequent day, or pay double rent,* is no waver of such first notice, or of the double rent which has accrued under it.

Messenger v. *Armstrong.* 1 T. R. 53

10. Where a demise is for a certain time, no notice to quit is necessary at or before the end of the term, to put an end to the tenancy: but a demand of possession and notice in writing, &c.

are necessary to entitle the landlord to double rent or value; and such demand may be made for that purpose above six weeks afterwards, if the landlord have done no act in the mean time to acknowledge the continuation of the tenancy; and he will thereupon be entitled to double value as from the time of such demand, if the tenant hold over: but if the rent were before reserved quarterly, and such demand be made in the middle of a quarter, the landlord cannot recover single rent for the antecedent fraction of such quarter.

Cobb v. *Stokes.* 8 E. R. 358

11. After a landlord has recovered in ejectment against his tenant, he may maintain debt upon the stat. 4 *G.* 2. *c.* 28. for double the yearly value of the premises, during the time the tenant held over after the expiration of the landlord's notice to quit.

Soulsby v. *Neving.* 9 E. R. 310

12. A landlord declared in debt, 1st, for the double value; 2dly, for use and occupation. The tenant pleaded *nil debet* to the first, and a tender of the single rent before the action brought to the second count, and paid the money into court; which the plaintiff took out before trial, and still proceeded; and the Court of K. B. held that this was no cause of nonsuit, as upon the ground of such acceptance of the single rent being a waver of the plaintiff's right to proceed for the double value; but that the case ought to have gone to the jury: and that the plaintiff's going on with the action after taking the single rent out of court, was evidence to shew that he did not mean to wave his claim for the double value, but to make it *pro tanto.* And it seems, that though the single rent were paid into court on the second count, yet if the plaintiff had not accepted it, but had recovered on the first count, the defendant would have been entitled to have the money so paid in deducted out of the larger sum recovered.

Ryall v. *Rich.* 10 E. R. 48

13. In debt for double the yearly value under 4 *G.* 2. *c.* 28. the plaintiff, after stating a demise to the defendant's wife, and her subsequent intermarriage with the defendant, alleged in the first count a notice to quit, and demand of possession delivered to the defendant and his wife; and in the second count alleged a notice to quit and demand of possession delivered to the wife previous to her intermarriage with the defendant; held, that to support the second count the husband need not be joined for conformity, and that to sustain the action it was not necessary to have given a notice to the husband subsequent to the intermarriage

Lake v. *Smith.* N. R. 174

14. The court will not, *after* a trial, stay the proceedings on payment of the rent, &c.; the stat. 4 *G.* 2. *c.* 28 only warranting such application *before* trial. And that statute is not confined to cases of ejectment brought after half a year's rent due *where no sufficient distress was to be found on the premises.*

Roe d. West v. *Davis.* 7 E. R. 363

15. One being in possession of premises as tenant from year to year, under an agreement for a lease for 14 years, and the rent being in arrear, enters into an indenture with his landlord, whereby, reciting such tenancy and arrears of rent accrued, *and that he had agreed to quit and to deliver up the premises to them,* and that a valuation should be made of his effects on the premises by two indifferent persons to be chosen, &c., and that the same should in the mean time be assigned and delivered up to a trustee for the landlords; the deed assigned his effects on the premises to such trustee, in trust to have the valuation made, and out of the amount to retain the arrears of rent, and pay the residue to the tenant: The Court of K. B. held that the tenant not having in fact quitted the possession, nor any valuation having been made of his effects; such agreement to quit, &c. being conditional, and the condition not performed, nor the agreement in any manner acted upon, did not operate as a surrender of the tenant's legal term from year to year; and consequently that the right of the landlord, to distrain for the arrears of rent, continued after six months from the making of the indenture.

Coupland & al. Assignees of Leedham v. *Maynard & al.* 12 E. R. 134

LAND-TAX ACT.

1. The appointment of clerks to the commissioners under the land tax act (25 *G.* 3. *c.* 4.) is at least for a year *R.* v. *The Commissioners of the Land-Tax for St. Martin's (Westminster.)* 1 T. R. 149

2. Buildings of a college in one of the universities taken into and made part of the college between the passing of the first land tax act and the act which made that tax perpetual, are exempted from the land tax. *All Souls College* v. *Costar.* 3 B. & P. 635

3. But where a college, soon after the passing of the first land-tax act, purchased lands of a parish under a private act of parliament, which provided that the college should pay all taxes which the premises then were, or should thereafter be subject to, it was held that the lands purchased were not exempted from the land tax. *ib.*

LEASE.

I. *Construction of; and what Instruments shall be valid as Leases.*

1. A paper, containing words of present contract, with an agreement that the lessee should take possession immediately, and that a lease, should be executed in future, operates only as an agreement for a lease, and not as a lease itself; and therefore it need not be stamped, if executed brfore stat. 23 *G.* 3. *c.* 58. imposing a stamp on agreements. *Goodtitle d. Estwick* v. *Way.* 1 T. R. 735

2. An instrument on an agreement stamp, reciting that *A.* in case he should be entitled to certain copyhold premises on the death of *B.* would immediately demise the same to *C.* declaring that *he did thereby agree to demise and let the same* with a subsequent covenant to procure a licence to let from the lord, operates as an agreement for a lease, and not as an absolute demise. *Doe* v. *Clare.* 2 T. R. 739

3. Words in an agreement that *A.* shall hold and enjoy, &c. if not accompanied with restraining words, operate as words of present demise. *Secùs*, if they be followed by others which shew that the parties intended that there should be a lease in future. The whole must depend on the intention of the parties. *Roe d. Jackson* v. *Ashburner.* 5 T. R. 163

4. These words in an instrument, "be it remembered that *J. B. hath let, and by these presents doth demise,*" &c. held to operate as a present demise, although the instrument contained a further covenant for a future lease. *Barry* v. *Nugent, T.* 22 *G.* 3. 5 T. R. 165, *n.*

5. An instrument executed on 24th *November*, 1807, on an agreement stamp, setting forth the condition of a future lease of lands and rent, to be entered upon, the one in *February*, and the other in *May* succeeding, "and that a lease was to be made on those conditions, with the usual covenants," signed by the defendant, is not a present demise, there being not only a stipulation for a future lease, but time given to perform it, and no present occupation: yet when the party was let into possession, and paid rent under the agreement, the Court held him liable to an action for the mismanagement of the farm, under a count stating that the premises were *demised* to him. *Tempest* v. *Rawling.* 13 E. R. 18

6. *A.* agreed to let her house to *B.*, "*during her life, supposing it be occupied by B., or a tenant agreeable to A.*" and "*a clause* was *to be added in the lease*" to give *A.*'s son an option to possess the house when of age: held that this was only an agreement for a lease, and not a perfect lease, the latter clause shewing it to be executory; and that a lease granted in pursuance of such agreement would only enure for the joint lives of *A.* and *B.* *Doe d. Bromfield* v. *Smith.* 6 E. R. 530

7. An instrument containing words of present demise will operate as a lease, if such appears to be the intention of the parties, though it contain a clause for a future lease or leases: as where one *thereby agrees to let and the other agrees to take* land for 61 years at a certain rent for building, and the tenant agreed to lay out 2000*l.* within four years in building five or more houses, and when five houses were covered in the landlord agreed to grant a lease or leases (which might be for the more convenient underletting or assignment of the leases) but this *agreement was to be considered binding till one fully prepared could be produced. Poole* v. *Bentley.* 12 E. R. 168

8. A lease in 1785, for 3, 6, or 9 years, determinable in 1788, 1791, 1794, is

a lease for 9 years, determinable at the end of 3 or 6 years, by either of the parties, on giving reasonable notice to quit.

Goodright v. *Richardson.* 3 T. R. 463

9. If a lease be granted for 7, 14, or 21 years, the lessee only has the option at which of the above periods the lease shall determine.

Dann v. *Spurrier.* 3 B. & P. 442

10. And so also under a lease for 14 or 7 years.

Doe d. Webb. v. *Dixon.* 9 E. R. 16

11. A lease executed by the tenant for life (in which the reversioner, who was then under age, is named, but not executed by him) is void on the death of the tenant for life; and an execution by the reversioner only afterwards, is no conformation of it, so as to bind the lessee in an action of covenant.

Ludford v. *Barber.* 1 T. R. 86

(And see title POWER.)

12. Tenant for life leases premises for 21 years, and before the expiration of that term dies; the trustees of the remainder-man, then an infant, continue to receive the rent reserved and he, on coming of age, sells the premises by auction; in the conditions of sale the premises are declared to be subject to the lease, and in the conveyance to the purchaser the lease is referred to as in the possession of the lessee; and in the covenant against incumbrances, that lease is excepted; the purchaser mortgages, and in the mortgage deeds the like notice is taken of the lease, and the mortgagees for some time receive the rent reserved; held, that the lease expired with the interest of the tenant for life, and that the notice since taken of it did not operate as a new lease. *Doe d. Potter & al.* v. *Archer & al.* 1 B. & P. 531

(And see LANDLORD AND TENANT II. 3.)

13. A lease in writing though not under seal, cannot be given in evidence, unless it be stamped. 8 T. R. 735

14. Though by the statute of frauds it is enacted that all leases by parol for more than three years shall have the effect of estates at will only, such a lease now ensures as a tenancy from year to year; the meaning of the statute being that such an agreement should not operate as a term.

Clayton v. *Blakely.* 8 T. R. 3

15. The mere cancelling in fact of a lease, is not a surrender of the term thereby granted within the statute of frauds, which requires such surrender to be *by deed or note in writing*, or *by act or operation of law.* Nor is a *recital* in a second lease, that it was granted in part consideration of the *surrender* of a prior lease of the same premises, a surrender *by deed* or *note in writing* of such prior lease; it not purporting in the terms of it to be of itself a surrender or yielding up of the interest; though in some instances the acceptance of a second lease for part of the same term before demised, may be a surrender of such prior term by operation of law; and this even though the second lease be voidable, if it be not merely void. But where tenant for life with a special power of leasing, reserving the best rent, *in consideration* (as recited) *of the surrender* of a prior term of 99 years, (of which above 50 were unexpired) and certain charges to be incurred by the tenant for repairs and improvements, &c. granted to him a new lease of the premises for 99 years *by virtue of the power reserved to her, or any other power vested in, or in anywise belonging to her*, which new lease was *void by the power* for want of reserving the best rent: held, that the second lease, which was intended and expressly declared to be granted by virtue of and under the power, and being apparently not intended by the parties to be carved out of the estate for life of the lessor, being void under the power, should not operate in law as a surrender of the prior term, as passing an interest out of the life estate of the grantor, contrary to the manifest intent of the parties; and consequently that the prior term, though the indenture of lease were in fact cancelled and delivered up when the new lease was granted, might be set up by the tenant of the premises in bar to an ejectment by the remainder-man after the death of tenant for life; however such second lease might have operated by way of estoppel as against the lessor during her life.

Roe d. Earl of Berkeley v. *Archbp. of York.* 6 E. R. 86

16. A lessee of land in the *Bedford Level* cannot object to an action by his landlord for a breach of covenant in not repairing, that the lease was void by the stat. 15 *Car.* 2. *c.* 17. for want of being registered; such act enacting, that "no lease, &c. should be of

force but from the time it should be registered," not avoiding it as between the parties themselves, but only postponing its priority with respect to subsequent incumbrancers, registering their titles before.

Hodson v. *Sharpe.* 10 E. R. 350

17. Under a power to demise for 21 years in possession, and not in reversion, a lease dated in fact on the 17th of *February*, 1802, *habendum* from the 25th of *March next ensuing the date thereof* is good, if not executed and delivered till *after* the 25th of *March*; for it *then* takes effect as a lease in possession, with reference back to the date actually expressed.

Doe d. Cox v. *Day.* 10 E. R. 427

II. *Of Provisoes and Covenants in.*

1. A proviso in a lease for 21 years that the landlord shall re-enter on the tenant's committing an act of bankruptcy, whereon a commission shall issue, is good.

Roe v. *Galliers.* 2 T. R. 133

2. A lessee, who had covenanted "not to let, set, assign, transfer, make over, barter, exchange, or otherwise part with the indenture," &c. with a proviso that the landlord might, in such case, re-enter, gave a warrant of attorney to confess judgment, on which the lease was taken in execution, and sold. This was held to be no forfeiture of the lease.

Doe d. Mitchinson v. *Carter.* 8 T. R. 57

3. But where it was found by verdict that the tenant gave such warrant of attorney to a creditor for the express purpose of enabling such creditor to take the lease in execution under the judgment; this was held to be in fraud of the covenant: and the landlord, under the clause of re-entry, recovered the premises in ejectment from a purchaser under the sheriff's sale.

Same Parties. 8 T. R. 300

(And see DEVISE XII. 4.)

4. Where one leased for 21 years, if the tenant, his executors, &c. should so long continue to inhabit and dwell in the farm-house, and actually occupy the lands &c. and not let, set, assign over, or otherwise depart with the lease: the Court of K. B. held that the tenant having become bankrupt, and his assignees having possessed themselves of the premises and sold the lease, and the bankrupt being out of the actual possession and occupation of the farm, the lessor might maintain an ejectment without a previous re-entry; the continuance of the term itself being made to depend upon the lessee's actual occupation.

Doe v. *Clark.* 8 E. R. 185

5. If a lease contains a proviso that the lessee, his executors, *&c.* shall not *set, let,* or *assign over* the whole or part of the premises without leave in *writing*, on pain of forfeiting the lease; the administratrix of the lessee cannot under-let without incurring a forfeiture, though for less time than the whole term.

Roe v. *Harrison.* 2 T. R. 425

6. A parol licence to let part of the premises does not discharge the lessee from the restriction of such a proviso.

2 T. R. 425

7. The lessor's receiving rent after the forfeiture is no waver, unless the forfeiture were known to him at the time.

2 T. R. 425

8. In a lease the lessor reserved a right to enter and cut timber, making reasonable satisfaction to the lessee for any wrongful act of cutting down by a third person, if without the consent of the lessor, however he may countenance the act afterwards.

Griffiths v. *Brome.* 6 T. R. 66

9. Where it only appeared that the lessor had promised to make compensation afterwards for such wrongful act, if the wrong-doer himself did not, it was not considered as an adoption of the act, nor as evidence of a prior consent to it whereon to found an action on the covenant. 6 T. R. 66

10. Where a lease for 21 years contained a proviso, that in case either landlord or tenant, or their respective heirs or executors wished to determine it at the end of the first 14 years, and should give six months notice in writing *under his or their respective hands*, the same should cease: held, that a notice to quit, signed by *two only* of *three* executors of the original lessor, to whom he had bequeathed the freehold *as joint tenants*, expressing the notice to be given *on behalf of themselves and the third executor*, was not good under the proviso, which required it to be given under the hands of all three. Neither could such notice be sustained under the general rule of law, that one joint tenant may bind his companions by an act done for *his benefit*; for *non constat* that the determination of the

lease was for the benefit of the co-joint tenant; which it was incumbent on the party who wished to avail himself of it to prove. And the notice to quit being such as the tenant was to act upon at the time, no subsequent recognition of the third executor will make it good by relation: nor was his joining in the ejectment evidence of his original assent to bind the tenant Py the notice. *Right d. Fisher & al.* v. *Cuthell.* 5 E. R. 491

11. The lessor, after a demise of certain premises with a portion of an adjoining yard, covenanted that the lessee should have "the *use* of the pump in the yard jointly with himself, *whilst the same should remain there*, paying half the expenses of the repair." The words *whilst*, &c. reserve to the lessor a power of removing the pump at his pleasure; and it is no breach of the covenant though he remove it without reasonable cause, and in order to injure the lessee. But without those words it would have been a breach of covenant to have removed the pump. *Rhodes* v. *Bullard.* 7 E. R. 116

12. Where assignees of a bankrupt advertised the lease of certain premises, of which the bankrupt was lessee, for sale by auction (without stating themselves to be the owners or possessed thereof), and no bidder offering, they never took possession in fact of the premises; held that this was no more than an experiment to ascertain the value, whether the lease were beneficial or not to the creditors, and did not amount to an assent on the part of the assignees to take the term; nor support an averment in a declaration in covenant for non-payment of rent for three years against them by the landlord, that all the estate, right, title, interest, &c. of the bankrupt in the premises came to the defendant by assignment thereof. *Turner* v. *Richardson.* 7 E. R. 335

13. One in consideration of 5*l.* 8*s.* in nature of a fine, and of a yearly rent of 5*s.*9*d.* demised certain ground, with the buildings, &c. for 21 years, with a proviso for distress if the rent were in arrear for 14 days. And the lessor covenanted at the end of 18 years of the term, or before, on request of the lessee, to grant a new lease of the premises "for the like fine, for the like term of 21 years, at the like yearly rent, *with* ALL *covenants, grants, and articles, as in that indenture were contained.* The court of K. B. held that this covenant was satisfied by the tender of a new lease for 21 years containing *all* the former covenants *except the covenant for future renewal.* And held that an averment, that the covenant for renewal in the indenture declared on corresponded with *various other leases*, before then successively made by the owners of the inheritance for the time being, could not be taken in aid to construe the meaning of the indenture: for supposing such evidence were admissible in any case where the renewals had been uniformly the same, yet *non constat* from this averment that *all* the former leases contained the same covenant for renewal. *Iggulden* v. *May.* 7 E. R. 237 (And see 2 N R. 449, where upon a writ of error, this judgment was affirmed.)

14. In a lease of ground, with liberty to make a water-course and erect a mill, the lessee covenanted for himself, his executors, &c. *and assigns*, not to have persons to work in the mill who were settled in other parishes, without a parish certificate; held that this covenant did not run with the land, or bind the assignee of the lessee. *The Mayor, &c. of Congleton* v. *Pattison.* 10 E. R. 130

15. A proviso in a lease for 21 years, that if either of the parties should be desirous to determine it in 7 or 14 years, it should be lawful for either of them, his executors or administrators, so to do, upon 12 months notice to the other, his heirs, executors, or administrators, extends, by reasonable intendment to the devisee of the lessor who was entitled to the rent and reversion. *Roe d. Bamford* v. *Hayley* 12 E. R. 464

16. A distinct covenant in a lease, whereby the tenant bound himself to pay the *property tax*, and all other taxes imposed on the premises, or on the landlord in respect thereof, though void and illegal by the stat. 46 *G.* 3. *c.* 65. § 115. will not avoid a separate covenant in the lease for payment of rent clear of all parliamentary taxes, &c. generally; for such general words will be understood of such taxes as the tenant might lawfully engage to defray. *Gaskell* v. *King.* 11 E. R. 165

17. A covenant in a lease for 21 years ending at *Michaelmas*, that the tenant should not during the term cut down any coppice "of less than 10 years growth," or at any unseasonable time

of the year, but that at the end of the term the landlord should pay the tenant the value "of all such growth of coppice as should be then standing and growing," was held by the Court of K. B. (one judge dissenting) according to its grammatical construction to bind the landlord to pay for the value of all the coppice of less than 10 years growth left on the premises at the end of the term. *Love* v. *Pares.* 13 E. R. 80

LEGACY.

1. No action at law lies to enforce payment of a legacy, the Court of Chancery being the proper jurisdiction for that purpose.
Deeks v. *Strutt.* 5 T. R. 690
2. But an action at law will lie against an executor to recover a specific chattel bequeathed, after his assent to the bequest. *Doe d. Lord Saye and Sele* v. *Guy.* 3 E. R. 120
3. Where there is a devise to *A.* for life of the rents and profits of a real estate, and the interests and dividends of personal property and after his death, the whole estates both real and personal to be divided between *B.* and *C.*; the executors and trustees are bound to pay to *A.* the annual produce of the personal as well as real property, especially if the personal property be money in the funds, without requiring a *receipt stamped as for a legacy*, under stats. 20 *G.* 3. *c.* 28: 23 *G.* 3. *c.* 58., and 29 *G.* 3. *c.* 51. [But see now stat. 36 *G.* 3. *c.* 52.]
Green v. *Croft.* 2 H. B. 30

LIBEL.

I. *What shall be; and how to be charged.*

1. The Court o C. P. held that an action could not be maintained for publishing a true account of the proceedings of a court of justice, however injurious such publication might be to the character of an individual. *Qu.* Whether the matter of justification ought not to be pleaded?
Curry v. *Walter.* 1 B. P. 525
2. The Court of K. B. refused to grant a criminal information against a bookseller as for a libel in printing a true, but unauthorized, copy of a report of the House of Commons; though the report reflected on the character of an individual.
R. v. *J. Wright.* 8 T. R. 293
3. It is neither the subject of a criminal prosecution, nor of an action, to publish a true account of the proceedings in parliament or of the courts of justice.
R. v. *J. Wright.* 8 T. R. 298
[But see *post* III. 8.]
4. If a court martial, after stating in their sentence the acquittal of an officer against whom a charge has been preferred, subjoin thereto a declaration of their opinion that the charge is malicious and groundless, and that the conduct of the prosecutor in falsely calumniating the accused is highly injurious to the service, the president of the court martial is not liable to an action for a libel for having delivered such sentence and declaration to the Judge Advocate.
Jekyll v. *Sir J. Moore.* 2 N. R. 341
5. To print of any person that he is a swindler, is a libel, and actionable.
J'Anson v. *Stuart.* 1 T. R. 748
6. Simply saying to another "*you are a swindler,*" held by the Court of C. P. not to be actionable.
Savile v. *Jardine.* 2 H. B. 531
7. A letter written to a third person calling plaintiff "a villain," held actionable, without proof of special damage. *Bell* v. *Stone.* 1 B. & P. 331
8. A servant cannot maintain an action against his former master for words spoken, or a letter written by him in giving a character of the servant, unless the latter prove the malice as well as falsehood of the charge, even though the master make specific charges of fraud. *Weatherstone* v. *Hawkins.* 1 T. R. 110
9. Although a master be not in general bound to prove the truth of a character given by him to a person applying for the character of his servant, yet if he officiously state any trivial misconduct of the servant to a former master, in order to prevent him giving a second character, and then himself upon application for a character, give the servant a bad character, the truth of which he is not able to prove, the jury may, from these circumstances, infer malice against the master, in an action against him by the servant.
Rogers v. *Clifton.* 3 B. & P. 587
10. In an action for a libel written in a foreign language, the plaintiff must set forth the libel in the original; and if he only set out a translation of it, the Court will arrest the judgment.
Zenobio v. *Axtell.* 6 T. R. 162

11. An indictment or information for a libel need not charge the offence to have been committed *vi et armis*, or allege that the libellous matter is false.
R. v. *Burke.* 7 T. R. 4

12. An indictment for publishing libellous matter, reflecting on the memory of a dead person, not alleging that it was done with a design to bring contempt on the family of the deceased, to stir up the hatred of the king's subjects against them, or to excite his relations to a breach of the peace, cannot be supported.
R. v. *Topham.* 4 T. R. 126

13. In an action for consequential damage from slander, imputing incontinence to the plaintiff, it is enough to state, that he was occasionally employed to preach to dissenters at a certain licensed chapel, from which he derived considerable profit, and that, by reason of the scandal, "the persons frequenting the said chapel refused to permit him to preach, and had discontinued the emoluments which they would otherwise have given him;" without saying who those persons were, or by what authority they excluded him, or that he was a preacher qualified under stat. 10 *Ann. c.* 2.
Hartley v. *Herring.* 8 T. R. 130

II. *Evidence.*

1. On the trial of an indictment for a libel, the only questions for the consideration of the jury are the fact of publishing, and the truth of the *innuendos.* Whether the subject-matter be or be not a libel is a question of law for the consideration of the court.
R. v. *The Dean of St. Asaph,* 3 T. R. 428, *n.*:—and *R.* v. *Withers,* 3 T. R. 428. [But see stat. 32 *G.* 3. *c.* 60; and the opinion of *Kenyon* Ch. J. in *R.* v. *Holt,* 5 T. R. 436.]

2. It is not competent to a defendant, charged with having published a libel, to prove that a paper, similar to that for the publication of which he is prosecuted, was published on a former occasion by other persons, who have never been prosecuted for it.
R. v. *Holt.* 5 T. R. 436

3. Proof that the defendant gave a bond to the stamp-office for the duties on the advertisements in a newspaper under the stat. 29 *G.* 3. *c.* 50, § 10. and had occasionally applied at the stamp-office respecting the duties, is evidence that he is the publisher.
4 T. R. 126

4. Proof of words spoken *to* a person will not support an indictment, charging that the defendant spoke them of such a person. *R.* v. *Berry.* 4 T. R. 217

5. A count for slanderous words spoken affirmatively, is not supported by proof that they were spoken by way of interrogation. The words must be proved as they are laid.
Barnes v. *Holloway.* 8 T. R. 150

6. The publisher of a weekly register received an anonymous letter tendering certain information concerning Ireland and desiring to know to whom the letter should be directed, to which an answer was returned in the register: after which two letters were received in the same hand writing, directed as mentioned, and having the Irish postmark on the envelopes, which two letters were proved to be the hand writing of the defendant, and the letters themselves containing expressions indicative of the writer's having sent them to the publisher of the register in *Middlesex* for publication. This was held to be sufficient evidence for the jury to find a publication in *Middlesex* by the procurement of the defendant.
R. v. *Johnson.* 7 E. R. 65

III. *Justification.*

1. There may be an implied justification of a libel, or of slander, from the occasion (as if read in a judicial proceeding), as well as on account of the subject-matter. 1 T. R. 110 (See *ante* I.)

2. A justification to an action for a libel for charging the plaintiff with being a swindler, must state the particular instances of fraud by which the defendant means to support it.
1 T. R. 748

3. A justification generally in the words of the libel, where the libel is general is not sufficient. 1 T. R. 748

4. It is no justification to an action of slander to plead that *A. B.* told the slander to the defendant.
Davis v. *Lewis.* 7 T. R. 17

5. But if the person repeating the slander at the same time mention the name of the person from whom he heard it, that may be pleaded in justification to an action brought against the former. 7 T. R. 17

6. In a justification for slander, that the defendant named the original author of it at the time, it is not sufficient to allege that the original slanderer used such and such words *or to that effect;* although in the libel declared on, the defendant stated that another had spoken the same slanderous words of the plaintiff, *or words to that effect;* but the defendant must give the very words used, though it be only necessary to prove some material part of them. *Maitland* v. *Goldney.* 2 E. R. 426

7. *Qu.* Whether a defendant can, by naming the original author, justify the publishing *in writing* slanderous words *spoken* by such other; especially *after knowing that they were unfounded ib.*

8. It is libellous to publish a highly coloured account of judicial proceedings, mixed with the party's own observations and conclusions upon what passed in court, which contained an insinuation that the plaintiff had committed *perjury:* and it is no justification to such insinuation of perjury against the plaintiff (who had sworn to an assault by *A. B.* on him), that it *did appear* (which was the suggestion in the libel) *from the testimony of every person in the room, &c. except the plaintiff,* that no violence had been used by *A. B.* &c.; for *non constat,* thereby that what the plaintiff swore was false. Neither is it sufficient in a justification to such a libel, where the extraneous matter was so mingled with the judicial account as to make it uncertain whether it could be separated, to justify the publication by general reference to *such parts of the supposed libel as purport to contain an account of the trial, &c.* and that the *said parts* contain a just and faithful account of the trial, &c.

Stiles v. *Nokes.* 7 E. R. 493

9. The justification of a libel must state issuable facts not general charges of misconduct. A libel charged an attorney with general misconduct, *viz.* gross negligence, falsehood, prevarication, and excessive bills of costs, in the business he had conducted for the defendant; a plea in justification repeating the same general charges without specifying the particular acts of misconduct upon demurrer was held insufficient. *Holmes* v. *Catesby.* 1 W. P. T. 543

IV. *Slander.*

1. Words are not actionable in themselves, unless they contain an express imputation of some crime liable to punishment. 6 T. R. 694

2. Saying of the plaintiff that he had *forsworn* himself, and that the defendant had three witnesses to prove it, is not actionable, unless the words be spoken with reference to some judicial proceeding in which the plaintiff had been sworn.

Holt v. *Schofield.* 6 T. R. 691

3. *Aliter,* saying that he was *perjured.* 6 T. R. 694

4. But "forsworn" cannot be explained by an innuendo to mean false swearing in a court of justice. 6 T. R. 694

5. If one call another "thief," together with other names of abuse not implying crime, and nothing be given in evidence to explain the word, can it scarcely be considered as imputing any thing but theft, and therefore the plaintiff in an action for damages is entitled to recover.

Penfold v. *Westcote.* 2 N. R. 335

6. These words spoken of a woman, "I have kept her common these seven years; she *hath given* me the bad disorder, and three or four other gentlemen," are not actionable, because they may refer to a time past; and no prohibition will be granted to a spiritual court, in which a sentence has been pronounced on a libel for this charge. *Carslake* v. *Mappledoram.* 2 T. R. 473

7. Charging a person with *having had* a contagious disorder is not actionable because it is no reason why the company of a person so charged should be avoided at that time, it referring to a time past. 2 T. R. 473

8. Action on the case for saying of a merchant, "he has brought a false bill of lading for half the cargo (meaning the lading of a particular ship) already," whereby he was injured as such merchant, and lost the confidence of several persons, (without naming them,) was held not maintainable, and judgment accordingly arrested, because the words did not of themselves impute any crime.

Feise v. *Linder.* 3 B. & P. 372

9. Defamatory words, which are actionable in themselves, are not the less so because they are alleged to have been spoken of one as a candidate to serve in parliament. In such an action it is

not necessary to set out the writ in order to shew that the plaintiff was a candidate. *Harwood* v. *Astley, Bart. (in error.)* N. R. 47

10. If defamatory words be spoken of two partner respecting their trade, they may maintain a joint action for the slander, averring special damage.
Cook & al. v. *Batchellor.* 3 B. & P. 150

11. Slanderous words must be understood by the court in the same sense in which the rest of mankind would ordinarily understand them. Therefore where one said of another that "*his character was infamous, &c.; that delicacy forbad him from bringing a direct charge, but it was a male child who complained to him;* such words were understood to mean a charge of unnatural practices, and sufficiently certain in themselves to be actionable, without the aid of an innuendo to that purpose, which it was admitted could not enlarge the sense. And held that such words could not be justified by any plea naming for the first time the person from whom the defendant heard the complaint.
Woolnoth v. *Meadows.* 5 E. R. 463

12. So where the defendant saying of the plaintiff that "he was under a charge of a prosecution for perjury; and that *G. W.* (an attorney of that name) had *the Attorney-General's* directions to prosecute the plaintiff *for perjury,*" is actionable. For after verdict (by which the jury, who are to judge of the intent of the speaker, must be taken to have negatived that he meant to speak of a prosecution for a perjury which the plaintiff had *not* committed,) the words, not having been justified, must be taken to be *false;* and being unqualified by any context, and unexplained by any occasion to warrant them, the law infers *malice* from the *falsehood* of an accusation which, in the common acceptation of the words, imputes *perjury* to the plaintiff.
Roberts v. *Camden.* 9 E. R. 93

13. Where special damage is necessary to be shewn in order to maintain an action for slander, it is not sufficient to prove a mere wrongful act of a third person, induced by the slander, such as that he dismissed the plaintiff from his employ before the end of the term for which they had contracted; but the special damage must be a legal and natural consequence of the slander.
Vicars v. *Wilcocks.* 8 E. R. 1

14. If, in consequence of words spoken, the plaintiff is deprived of substantial benefit arising from the hospitality of friends, this is a sufficient temporal damage whereon to maintain an action.
Moore v. *Meagher (in error)* 1 W. P. T. 39

LIEN.

1. A factor has no lien on goods unless they come into his actual possession.
Kinloch v. *Craig.* 3 T. R. 119, 783.

2. A pawnbroker has no lien on plate, after the death of a tenant for life who pawned it with him, as against the remainder-man, although the pawnee had no notice of the settlement.
Hoare v. *Parker.* 2 T. R. 376

3. Goods delivered to a person claiming them wrongfully, who pays freight and other charges, cannot be detained for those expenses against the rightful owner. *Lempriere* v. *Pasley.* 2 T. R. 485

4. Where a broker pledges the goods of his principal as his own, the pawnee for a valuable consideration, who claims under such tortious act of the broker, cannot retain the goods against the principal in trover for the amount of the lien which the broker had on the goods for a balance due from the principal to him at the time of such pledge; the lien being personal and not transferable by such tortious act of the broker.
M'Combie v. *Davies.* 7 E. R. 5
[And see TROVER.]

5. A quantity of timber placed in a dock, on the bank of a navigable river, being accidentally loosened, is carried by the tide to a considerable distance, and left at low water upon a towing path: *A.* finding it in that situation, conveys it to a place of safety, beyond the reach of the tide at high-water: *A.* has no *lien* on the timber for the trouble or expense to which he may have put himself in the carriage of it; but is liable to an action of trover, unless he deliver it up to the owner on demand, though nothing be tendered by the owner by way of compensation.
Nicholson v. *Chapman.* 2 H. B. 254

5. But probably in such case, *A.* might maintain an action against the owner for a compensation. 2 H. B. 254

7. A customer lodges bills of exchange in the hands of his banker generally, and when the banker advances money to him he applies it to the discount of such of the bills as happen to be nearest

in value to the sum advanced, but without any special agreement to that effect: this does not invalidate the banker's general lien upon all the other bills in his hands, but he may retain them, in order to secure the payment of his general balance.

Davis v. *Bowsher.* 5 T. R. 488

8. If *A.* deposit goods with *B.* for sale, and *B.* promise to pay the proceeds to *A.* when sold; *B.* has no lien on the goods (if not sold) for the balance of his general account arising upon other articles. *Walker & al. Ass.* v. *Birch & al. Ass.* 6 T. R. 258

9. An *absolute* bill of sale of a ship *at sea* is void by stat. 26 *G.* 3. *c.* 60. § 17. unless the certificate of the registry be recited therein; although the vendee give at the same time an undertaking to restore the ship on a future day on payment of a certain sum advanced by him on the credit of this security.

Rolleston v. *Hibbert.* 3 T. R. 406 (See tit. SHIP.)

10. And though the vendee had also the grand bill of sale, and had taken possession of the ship immediately on her arrival, it was held that he could not retain the ship as having a lien on her, against the assignees of the vendor, who became a bankrupt after his transfer of the ship. 3 T. R. 406

11. The assignee of a policy of insurance on goods, who became such by the indorsement to him of the bill of lading of the goods by the consignor after he had directed his correspondent to make the insurance, takes it subject to the lien of the correspondent of the consignor for his general balance; and can only claim, subject to that lien, the money received on such policy by the broker, in whose hands it was deposited for that purpose by the correspondent. But the broker has no sub-lien on the policy for the general balance of his own account with such correspondent, if he knew at the time that the policy was effected for another person.

Man v. *Shiffner.* 2 E. R. 523 (And see INSURANCE II. 11.)

12. A principal gives notice to his factor of an intended consignment of a ship to him for the purpose of sale, and in consequence draws bills on him, which the factor accepts: and then the principal dies and his executors direct the captain of the ship to follow his former orders; who thereupon delivers the ship into the possession of the factor, who sells the same: held, that the factor has a lien upon the proceeds, as well for the amount of money disbursed by him for the necessary use of the ship on its arrival, and for the acceptances by him actually paid, as for the amount of his out-standing acceptances not then due.

Hammonds v. *Barclay.* 2 E. R. 227

13. *Quere.* Whether the captain of a ship parts with his lien on goods for his freight by depositing them in the king's warehouse pursuant to the requisitions of an act of parliament?

Ward v. *Felton.* 1 E. R. 512 (And see 1 E. R. 507. tit. SHIP.)

14. The master of a ship has no lien on it for money expended, or debts incurred, by him for repairs done to it on the voyage.

Hussey v. *Christie.* 9 E. R. 426

15. In a respondentia bond, the condition, after reciting that the money was lent *upon the goods laden and to be laden* on board a certain ship on her voyage out and home, was that if the ship should proceed on her voyage, and return within 36 months (the dangers of the seas excepted), and if the borrower within 30 days after her arrival should pay to the lender the sum agreed on, or if in the voyage and within the said 36 months the ship should be lost by fire, enemies, or other casualties, the borrower should, within six months after such loss, pay to the lender a proportionable average on all the goods carried out and acquired during the voyage which should be saved, then the obligation to be void: held, that this was no more than a *personal* obligation from the borrower to the lender, and did not give the latter any *specefic pledge or lien* on the home cargo, or the proceeds thereof.

Busk v. *Fearon.* 4 E. R. 319

16. The lien of a common carrier for his general balance, however it may arise in point of law from an implied agreement to be inferred from a general usage of trade, proved by clear and satisfactory instances sufficiently numerous and general to warrant so extensive a conclusion affecting the custom of the realm; yet it is not to be favoured, nor can be supported by a few recent instances of detention of goods by four or five carriers for their general balance. But such a lien may be inferred from evidence of the par-

ticular mode of dealing between the respective parties.
Rushforth & al. v. *Hadfield.* 6 E.R.519

17. And therefore where a jury negatived such general usage, though frequent instances of such usage were produced at the trial, and in one instance so far back as 30 years, the Court of K. B. refused to grant a new trial; and stated their opinion that the jury had done right.
Rushforth & al. v. *Hadfield.* 7 E.R.224

18. And the Court of C. P. held that a carrier who, by the usage of a particular trade, is to be paid for the carriage of goods by the consignor, has no right to retain them, against the consignee, for a general balance due to him for the carriage of other goods of the same sort sent by the consignor.
Butler v. *Woolcott.* 2 N. R. 64

19. The dyers of *Halifax* were found by verdict to have no lien for their general balance; and therefore the court held that they could not retain for the price of dying any other than the particular goods dyed, or at most only for the dying of such goods as were delivered to them at one and the same time, under one entire contract; but certainly not for different parcels delivered at several times, which they happened to collect in their hands at one time, and some of which they had afterwards parted with without obtaining payment. *Close & al. Assignees* v. *Waterhouse.* 6 E. R. 523

20. A vendor has a general lien for the price of the goods sold while in his possession. *Hanson & al. Assignees* v. *Meyers.* 6 E. R. 614
(And see 6 E. R. 614. tit. TROVER.)

21. One having purchased of the consignee all the tar on board a ship under two bills of lading, and having obtained delivery from the captain of the greater part of the goods under one of the bills of lading, the captain has a lien on the rest of the tar under the other bill of lading for the freight of the whole: and this, though some of it had been removed into a lighter alongside of the ship sent by the vendee, which the captain afterwards fastened to the ship's side. *Sodergreen* v. *Flight, G. H. Sittings after T.* 1796. *cor. Lord Kenyon* C. J. (cited)
6 E. R. 622

21. *A.* a factor, having sold goods of *B.* in his own name to *C.*, the latter, without paying for these goods, sent another parcel of goods to *A.* to sell for him, never having employed *A.* as a factor before. *C.* then became bankrupt, and his assignees claimed the goods sent by him to *A.*, and which still remained unsold, tendering the charges upon those goods. *A.* refused to deliver them up, claiming a lien upon them for the price of the former goods sold by him to *C.*, there being a balance then due from *B.* to himself: held that the assignees were entitled to recover.
Houghton v. *Matthews.* 3 B. & P. 485

LIMITATION OF ACTIONS.

1. Where the lord's right of entry for a forfeiture be not barred after 20 years by the statute of limitations? *Qu.* *Roe d. Tarrant* v. *Hellier.* 3 T.R.172, 3

2. *I. S.* demised lands to the rector of *D.* for 40 years at a certain rent in the lease; the rector, after covenanting for payment of the rent, further granted to *I. S.* the tithe of oats for the parish of *D.*; the lease also contained a proviso for re-entry, in case the rent should be in arrear, or *I. S.*, his heirs, &c. should be disturbed by the rector or his assigns in the receipt of the tithe, and concluded with a covenant on the part of *I. S.*, that the rector should quietly enjoy the lands under the covenants, grants, and agreements contained in the lease. After the expiration of the lease, the rector continued to hold the land, but withheld the rent for more than 20 years; the heirs of *I. S.* at the same time continuing to take the tithe of oats, and some confusion existing as to the respective rights of the rector and the heirs of *I. S.*, the latter being portionists of the tithes of the parish; held in ejectment by the representatives of *I. S.* against the rector that the possession of the land by the latter were not adverse so as to let in the operation of the statute of limitations.
Doe d. Pellat v. *Ferrars.* 2 B. & P. 542

3. Where the ancestor died seised, leaving a son and daughter infants; and on the death of the ancestor a stranger entered, and the son soon after went to sea, and was supposed to have died abroad *within age*; held, that the daughter was not entitled to 20 years to make her entry after the death of her brother, but only to 10 years;

more than 20 years having, in the whole, elapsed since the death of the person last seised.

Doe d. George v. *Jesson.* 6 E. R. 80

4. If an estate, which, by a fine levied, is turned to a right of entry, can be devised, the devisee must enter within the same time within which the devisor must have entered if living.

Goodright d. Burton v. *Forrester.* 1 W. P. T. 578

4. Though one plaintiff be abroad, if the other be in *England*, the action must be brought within six years after the cause of action arises.

Perry v. *Jackson.* 4 T. R. 516

6. Where a bill of exchange is drawn payable at a certain future period, for the amount of a sum of money lent by the payee to the drawer at the time of drawing the bill, the payee may recover the money in an action for money lent, although six years have elapsed since the time when the loan was advanced; the statute of limitations beginning to operate only from the time when the money is to be repaid *i. e.* when the bill becomes due.

Wittershiem v. *Carlisle, (Countess).* 1 H. B. 631

7. One of two makers of a joint and several promissory note having become a bankrupt, the payee receives a dividend under the commission, on account of the note: this will prevent the other maker from availing himself of the statute, in an action brought against him for the remainder of the money due on the note: the dividend having been received within six years before the action brought.

Jackson v. *Fairbank.* 2 H. B. 340

8. If there be a mutual account of any sort between the plaintiff and defendant, for any item of which credit has been given within six years, that is evidence of an acknowledgment of there being such an open account between the parties, and of a promise to pay the balance, so as to take the case out of the statute.

Catling v. *Skoulding.* 6 T. R. 189

9. If goods are consigned to a factor for sale on commission, it shall be presumed that he contracts to account for such as are sold, to pay over the proceeds, and to redeliver the residue unsold, on demand. And an action does not lie against him for not accounting, till after a demand made of an account. Therefore the statute of limitations runs only from the time of a demand made. After a reasonable time elapsed, a jury might presume that the consignor had made a demand and that the factor had accounted. And 14 years would be a sufficient time for such a presumption; if it were not rebutted by circumstances.

Topham v. Braddick. 1 W. P. T. 572

10. A letter, written by a defendant (who pleaded the statute of limitations to an action of assumpsit) to the plaintiff's attorney on being served with a writ, couched in ambiguous terms, neither expresly admitting or denying the debt, should be left to the jury to consider whether it amounts to an acknowledgment of the debt, so as to take it out of the statute.

Lloyd v. *Maund.* 2 T. R. 760

11. Under a plea of the statute of limitations the plaintiff gave in evidence a letter of the defendant in answer to an application for payment of his debt, in which the latter referred the plaintiff to his solicitors by whose opinion he should be governed, adding, "they are in possession of my determination and ability.;" and also a conversation with the defendant's solicitors, in which they stated that if the plaintiff had any letter which would bind the defendant, the debt would be paid, if it amounted to 100*l.*; this being left to the jury, a verdict was found for the plaintiff: but the court inclining to think it did not take the case out of the statute granted a new trial.

Bicknell v. *Keppel.* N. R. 20

12. An acknowledgment of the debt, though accompanied with a declaration by the defendant that he did not consider himself as owing the plaintiff a farthing, *it being more than six years since he contracted*, is sufficient to take the case out of the statute.

Bryan v. *Horseman.* 4 E. R. 599

13. So where the defendant, in an affidavit for leave to plead the statute stated that *since the bill of exchange* (on which the action was brought) *no demand for payment had been made on him*, it was deemed sufficient to be left to the jury, as an acknowledgment. *Rucker* v. *Sir S. Hannay, B. R. T.* 29 *G.* 3. *(cited).* 4 E. R. 604, *n.*

14. Evidence of an acknowledgment by the defendant within six years of an old existing debt of above six years standing due to the plaintiff's intestate but which acknowledgment was made

after the intestate's death, will not support a count by the administrator, laying the promise to be made to his intestate, to which the statute of limitations was pleaded. *Sarell (Administrator)* v. *Wine.* 3 E. R. 409

15. Where an action must be brought within a limited time, it is sufficient for the plaintiff to prove a writ sued out within such time and his declaration within a year afterwards, without shewing such writ returned.

Parsons v. *King.* 7 T. R. 6

16. But if a first writ be sued out within the time, and continued by a subsequent writ sued out after the time, he must shew the first writ to have been returned.

Harris q. t. v. *Woolford.* 6 T. R. 617

17. And where the first writ, issued within the time, but was neither served or returned, and in the same term, but after the expiration of the limited time, a writ by continuance issued and was duly served, and the declaration was of the same term. Held that the first writ, not having been served could not support the declaration, and not having been returned, could not be connected with the second writ so as to support the action.

Stanway q. t. v. *Perry.* 2 B. & P. 157

18. But if the first writ be returned, the continuances may be entered at any time. 6 T. R. 617

19. An attachment of privilege is not a continuance of a bill of *Middlesex*, so as to avoid the statute of limitations.

Smith v. *Bower.* 3 T. R. 662

20. An action cannot be maintained against an officer of the customs, for seizing goods as forfeited by the revenue laws, unless it be brought *within three months after the actual seizure:* notwithstanding a suit is instituted in the exchequer for the condemnation of the good, which is depending at the expiration of the three months.

Godin v. *Ferris.* 2 H. B. 14

21. To an action brought by the assignees of an insolvent debtor, to recover money owing to him before his insolvency, in which the plaintiff's declare, that in consideration of the money being due to the insolvent, the defendant promised to pay them as assignees, it is a *bad plea* to say "that the cause of action first accrued to the insolvent before the plaintiffs became assignees, and that six years had elapsed after the cause of action first accrued to the insolvent, and before the suing out of the writ of the plaintiffs."

Kinder v. *Paris.* 2 H. B. 561

22. *Quere.* Whether in such case, the defendant might plead that the money was first due to the insolvent, more than six years before the action was brought, and that he had made no *express* promise to the plaintiffs within six years. 2 H. B. 561

23. *Qu.* Also whether in such an action the plaintiff must not prove an *express* promise. 2 H. B. 561

24. Where the commander of one of the king's armed vessels seized a vessel and cargo at sea, and brought them into the next port on suspicion of smuggling, and after process in the Exchequer the owner obtained an order for re-delivery, under which he obtained only part of the goods from the defendant; the owner cannot maintain trover for the remainder if the action were brought *after three months from the original seizure*, though *within three months from the order of the re-delivery.*

Saunders v. *Saunders.* 2 E. R. 254

25. Where the plaintiff complained of a plea of *trespass*, for that the defendant with force and arms *assaulted and seduced* the plaintiff's wife, *whereby* he lost the comfort of her society, &c. against the peace, &c. to his damage, &c. Whether this be *trespass* or *case* (and former authorities have considered it to be case) at any rate a plea of not guilty *infra sex annos* is good on general demurrer.

Macfadzen v. *Olivant.* 6 E. R. 387

26. Assumpsit on a note payable by instalments, plea in bar as to the said several causes of action, except the last instalment, that "the said several causes of action did not, nor did any of them accrue within six years:" held on special demurrer, that though some of the instalments might be barred and the others not, yet that the introduction to the plea and the body of it were inconsistent.

Gray v. *Pindar.* 2 B. & P. 427

LIMITATIONS BY DEED.

I. *Construction of.*

1. The words *limit and appoint* in a deed may operate as words of grant, so as to pass a reversion.
Shove v. *Pincke.* 5 T. R. 124. 310
2. Cross-remainders in a deed cannot be raised by implication.
5 T. R. 427. 521, & 1 E. R. 416
3. They can only be raised by proper words of limitation; however plainly expressed the intention of the parties may be. Under a limitation in a marriage settlement to the use of all and every the daughter and daughters of, &c. to be begotton, share and share alike, equally to be divided between them, and of the heirs of the body and bodies of all and every such daughter and daughters; and for default of such issue to the right heirs, &c.; held, that there were no cross-remainders between the daughters or their issue.
Doe d. Foquett v. *Worsley.* 1 E. R. 416
4. But they may by the general words that there shall be cross remainders.
5 T. R. 431
5. For no technical precise form of words is necessary to create them.
5 T. R. 431
6. There may be a limitation to one unborn for life only, but not to the issue of such an one for life.
Brudenell v. *Elwes.* 1 E. R. 452
(And see 1 E. R. 442. tit. POWER.)
7. If an estate be limited by deed to husband and wife, and the heirs *on* the body of the wife by the husband to be begotten, both have an estate tail. *Denn* v. *Gillet.* 2 T. R. 431
8. But if the remainder be limited to the heirs *of* the body of the wife by the husband to be begotten, the estate tail vests in the wife solely. 2T.R.431
9. Where there is an estate limited to a person for life, with remainder to the heirs of the body of the same person, it is an estate tail; but the limitation of the remainder must be to the heirs of the body of that person alone: therefore, if an estate be limited to *A.* for life, remainder to the heirs of the bodies of *A.* and *B.*, it is not an estate-tail. 2 T. R. 435
10. The limitations in a deed were to trustees to the use of *A.* and *B.* for their lives, remainder to the use of the child or children of *B.* in tail as tenants in common, "and in case any such child or children should die without issue of his, her, or their bodies, then the part of such child should be and remain to the use of the *surviving* child or children of *B.* and the heirs of his, her, or their bodies issuing; and in case *all* the said children should die without issue, &c. then to *A.* in fee;" held, that the deed created cross-remainders between the children of *B.*; and that on the death of one without issue, his share vested in a surviving child and the heir of one deceased, as tenants in common. *Doe d. Watts* v. *Wainewright.* 5 T. R. 427
11. A limitation by a deed, to the use of *A.* for life with remainder to *the first son of the body of A.* lawfully issuing and *for default of such issue,* to the second, third, and other sons of *A. and of the several heirs male of the body and bodies of all and every such son and sons respectively issuing* gives an estate in *tail male* to the first son of *A.*
Owen v. *Smith.* 2 H. B. 594
12. By deed and fine an estate was limited to the use of the husband for life, remainder to trustees and their heirs during his life to preserve contingent remainders, remainder to the wife for life, remainder to the trustees and their heirs (not saying during her life), in trust to support the contingent uses and estates thereinafter limited, remainder to the first and other sons in tail, remainder to the wife in tail, remainder in default of issue to such persons and for such estates as she should appoint, &c.; held that the trustees took a legal estate in fee after the determination of the wife's life estate, and that all the subsequent limitations were trust-estates; held also that an appointment by the wife to the use of the right heirs of the husband could not unite with the antecedent life estate of the husband, but could only give an equitable estate to the person who at his death should answer the description of his right heir.
Venables & Ux. v. *Morris.*
7 E. R. 438 & 342
13. Under a limitation in a marriage settlement, to the husband for life, then to the wife for life, then to the heirs of the body of the wife and their heirs, the wife took an estate tail.—And though it was recited in the deed, that the husband's father conveyed in consideration of the marriage, and "for settling and establishing the lands, &c.

to the uses thereafter expressed," and subsequent uses were added, in the deed, the Court of K. B. would only take notice of the legal estate; and the husband and wife having levied a fine and having agreed to sell the estate to a purchaser from whom they had received a deposit; the Court of K. B. held that they could make a good title and therefore, were not liable to repay the deposit-money in an action for money had and received.

Alpass v. *Watkins.* 8 T. R. 516

14. *A.* being possessed of lands for a term of 999 years, previous to his marriage with *B.*, granted the term to "*B. and her heirs, immediately after the death of A.* to hold the same to the said *B.* and her heirs to and for her and their own proper use for ever;" the marriage took effect, *A* survived *B.* and died without issue, intestate, and without having taken out administration to *B.* his wife; the term upon the death of *A.* went to his administrator, and not to the administrator of *B.*: the court being of opinion that the deed must be construed as a present gift to the wife in case she survived her husband, to take effect in possession on that event. *Doe d. Roberts & Ux. & al.* v. *Polgrean.* 1 H. B. 535

15. By settlement before marriage the husband's estate was conveyed to trustees, to the use of the husband for life *sans waste*, remainder to trustees to preserve contingent remainders, remainder to the use of the wife *for life for her jointure*, and in bar of dower, remainder to the first and other sons of the marriage in tail male, remainder to the first and other daughters in tail male, *remainder to the heirs of the body of the husband and wife*, remainder to the right heirs of the husband; the wife survived the husband and had no issue; the Court of K. B. held that she was tenant in tail after possibility, &c. that she was unimpeachable of waste, and was entitled to the property of the timber when cut by her. *Williams & al.* v. *Williams* 12 E. R. 209

II. *Contingent, or vested Remainders; what Words shall create.*

1. Where *R. Frank*, on the marriage of his son levied a fine to the use of himself, during the joint lives of himself and his son, and after the decease of either to the use of *Susan Cotele* for life, and after her decease to the use of the issue male of her and his son, and the heirs of their bodies, and in default thereof *to the use of the heirs to be begotten on the body of Susan by his son*, remainder to his own right heirs, and *S. C.* died, leaving only five daughters; on the death of *R. F.* a question arising as to what estate his son took, it was resolved, 1st, That if he had been joint tenant with the wife for life, this had been an estate tail in both, as the word "heirs" is not applied to any body particularly; 2dly, That neither husband nor wife had an estate tail; not the husband, because he had no prior estate for life; nor the wife, because, though she took an estate for life, yet the *heirs* are not applied to her body alone; and, 3dly, That it was *a contingent remainder* to the heirs of both their bodies. 2 T. R. 435

2. By a marriage settlement lands were conveyed to trustees to the use of the wife for life, remainder to the use of the husband for life, remainder to the use of all and every the children of the marriage, or such of them, and for such estates, &c. as the husband and wife should appoint, and for want of such appointment to the use of all and every the child or children equally, if more than one, as tenants in common, and if but one, then to such only child, his or her heirs or assigns for ever; remainder over: in the deed was contained a power, enabling the settlers to revoke the uses of the settlement, and the trustees to sell the estate, and convey it to a purchaser, *so as* the purchase-money should be paid to the trustees (and not the settlers) and invested in the purchase of other lands to the same uses; it was held that *the remainder to the children was a vested remainder in fee*, liable however to be devested by an appointment by the parents.

Doe d. Willis v. *Martin.* 4 T. R. 39

[A writ of error was afterwards brought on this judgment in the House of Lords, but which was non-prossed See 5 T. R. 521.]

3. In such a case where no appointment was made, the remainder to the children was not defeated by a deed of revocation by the parents, and a conveyance by them and the trustees to a purchaser, who paid the consideration money to the settlers (not to the trustees), which was never laid out in the purchase of any other lands. 4 T. R. 39

4. The above power of revocation was conditional; and as the conditions (*ass.* the payment of the money to the trustees, and the settling of other estates to the same uses) were not performed, the deed of revocation was a nullity. 4 T. R. 39

5. *A.*, a grandfather after the marriage of his son *B.*, who had two children then living, by deed conveyed lands to trustees to the use of himself for life, remainder to *B.* for life; remainder to trustees, &c.: remainder to the use of such child or children of *B.* and in such shares, &c. as *B.* should appoint; and in default of such appointment "to the use of all and every the children of *B.* and the heirs of their several and respective bodies as tenants in common, but if only one such child, to the use of such only child, and the heirs of his or her body; remainder to the right heirs of *A.* in fee:" then *A.* conveyed the reversion in fee to *C.*; afterwards *B.* had other children, and died without appointing: held, that *B.*'s children took vested interests as tenants in tail, and that on the death of each child without issue his share fell into the reversion conveyed to *C.* *Doe d. Tanner* v. *Dorrell.* 5 T. R. 518

6. By a marriage settlement lands were limited to *A.* for life, remainder to *B.* his intended wife for life, with intermediate remainders, remainder to the heirs of the body of *B.* *A.* became a bankrupt, and by an act of parliament passed to vest his estates in trustees for the payment of his debts, &c. the lands were given after payment, &c. to *B.* for life, with *such remainders over* (in general terms of reference) *as were limited by the settlement.* Under these circumstances *B.* had a vested estate-tail of which a recovery might be suffered. *Goodright d. Burton* v. *Rigby.* 2 H. B. 46 Affirmed in K. B. 5 T. R. 177]

LITERARY PROPERTY.

1. An author whose work is pirated before the expiration of twenty-eight years from the first publication of it, may maintain an action on the case for damages against the offending party, although the work was not entered at Stationers'-Hall, pursuant to the directions of stat. 8 *Ann. c.* 19. and although it was first published without the name of the author affixed.
Beckford v. *Hood.* 7 T. R. 620

2. Two penalties may be incurred on the same day on stat. 12 *G.* 2. *c.* 36. for selling books, the originals of which have been written and published here, and afterwards re-printed in another country, and imported into this, *if the acts of sale be distinct.*
Brooke v. *Milliken.* 3 T. R. 509

3. Acting a piece on the stage, of which the plaintiff had bought the copyright, is not evidence of a publication by the defendant within the meaning of stat. 8 *Ann. c.* 19.
Coleman v. *Wathen.* 5 T. R. 245

4. The assignee of a print may maintain an action on statute 17 *G.* 3. *c.* 57. against any person who pirates it.
Thompson v. *Symmonds.* 5 T. R. 41

5. In such an action it is not necessary to produce the plate itself in evidence: one of the prints taken from the original plate is good evidence. 5 T. R. 41

6. The date must always appear on the print. 5 T. R. 41

7. *Qu.*—Whether, on an assignment, the name of the inventor or the assignee should appear? 5 T. R. 41

8. An action lies to recover damages "for pirating the new corrections and additions to an old work."
Cary v. *Longman.* 1 E. R. 358

9. No such action lies for publishing sea charts on an improved and more useful principle, with material corrections, *though many of the lines were copied from old charts.* *Sayre* v. *Moore*, *Sittings after Hil.* 25 *Geo.* 3. 1 E. R. 361, *n.*

10. But the action lies for *a servile imitation of parts of a book* of chronology through other parts of the book were different. *Trusler* v. *Murray*, *Sittings after Mich.* 30 *Geo.* 3. 1 E. R. 363, *n.*

11. An action is maintainable on the stat. 8 *Ann. c.* 19. for pirating *a single sheet* of music.
Clementi v. *Goulding.* 11 E. R. 244

LOTTERY.

1. The sale of lottery tickets, by which the purchaser is to be entitled to all the benefit of them, *except the* 10*l. prizes*, is prohibited and made void by statute 22 *G.* 3. *c.* 47.

Deey v. *Shee.* 2 T. R. 617

2. Since that act no interest in any ticket can be conveyed less than the whole of the specific ticket or share; and those shares not less than sixteenths. 2 T. R. 617 (And see CONVICTION IV.)

3. The printer of a newspaper publishing an illegal proposal for gambling in the lottery incurs a penalty under statute 22 *G.* 3. *c.* 47. § 13., which enacts that no person shall sell the chances of tickets, &c. nor *publish* any prosposal for it, under a penalty of 50*l. King q. t.* v. *Smith, M.* 32 *G.* 3. 4 T. R. 414. [The printers of the newspapers afterwards obtained an act of indemnity against penalties incurred before this determination. See stat. 32 *G.* 3. *c.* 61.]

4. The ticket last drawn out of the lottery was considered as the last drawn ticket, so as to entitle the holder to a prize, though another number was never drawn, and no account could be given of it. *Schinotti* v. *Bumstead*, 6 T. R. 646: (See ACTION ON THE CASE II. 11.)

M.

MANDAMUS.

I. *For what Offices or Purposes, &c. grantable:*

1. The Court granted a *mandamus* directed to the commissioners of the land-tax in *A.* to elect a clerk to them in the department for the rates and duties on windows, houses, and lights. *R.* v. *The Commissioners of the Land-tax for St. Martin's Westminster.* 1 T. R. 146

2. The office of clerk of the Bridge-house estates in *London* being an ancient office for life, the duty of which is to superintend certain estates which are appropriated by the Corporation to the support of *London* bridge, some of those estates having been granted to them for that express purpose, a *mandamus* lies to restore to it. 2 T. R. 177

3. A *mandamus* granted to restore to the office of clerk or surveyor of the city work; *(H.* 6. *G.* 2. *there cited;)* which was also an office for life, on receiving which an oath was administered. 2 T. R. 177

4. A *mandamus* to admit a vestry clerk refused. *R.* v. *Croydon, Churchwardens.* 5 T. R. 713

5. A *mandamus* may be granted under stat. 11 *G.* 1. *c.* 4. to proceed to the election of an *annual* officer in a corporation, as well as to the head officer. *The case of the Corporation of Scarborough,* (2 *Stra.* 1180.) 2 T. R. 732, *n.*

6. If a visitor of a college in one of the Universities refuse to exercise his visitatorial power by receiving and hearing an appeal, this Court will grant a *mandamus* to compel him. *R.* v. *Ely (Bishop.)* 5 T. R. 475

7. That a *mandamus* lies to a visitor to hear an appeal, and give some judgment; see also *R.* v. *The Bishop of Lincoln, E.* 28 *G.* 3. 2 T. R. 338, *n.* (and title VISITOR.)

8. A *mandamus* will lie to compel a dean and chapter to fill up a vacancy among canons residentiary; and on such a *mandamus* the court will compel an election at the peril of those who resist. *Chichester (Bishop)* v. *Harward.* 1 T. R. 652

9. No mandamus lies to the archbishop of Canterbury to issue his fiat to the proper officer, &c. for the admission of a doctor of civil law, graduated at *Cambridge*, as an advocate of the Court of Arches. *R.* v. *Canterbury (Abp.)* 8 E. R. 213

10. A *mandamus* will lie to the commissioners of excise to grant a permit, if a proper case be laid before the court. 2 T. R. 381

11. A *mandamus* to a corporation to put the corporate seal to the certificate of the election of a corporator, in order that it may be laid before the king for his approbation, is granted of course. *R.* v. *The Mayor &c. of York.* 4 T. R. 699

12. Therefore such a writ was granted, directed to the corporation of *York*, on an affidavit that the recorder, applying, had the majority of legal votes: though it was stated that the other candidate had the majority at the election, and that the corporation had already certified his election.
4 T. R. 699

13. Where, by the constitution of a corporation, a person having served a seven years apprenticeship to a freeman residing in the town, is entitled to his freedom, and where by a bye law the indentures must be inrolled by the town clerk within a limited time, an apprentice who is bound to a freeman, resident only occasionally and whose service is to be performed at another place, is not entitled to have his indentures inrolled, nor will the court grant a *mandamus* to the town-clerk for that purpose.
R. v. *Marshal.* 2 T. R. 2

14. If it appear with sufficient certainty to the court, that a person has been elected mayor of a borough on the day appointed by the usage, who is not qualified to accept the office, by reason of his not having previously taken the sacrament within the time limited by law, they will grant a *mandamus* to the electors to proceed to a new election under the stat. 11 *G.* 1. *c.* 4. § 2. as if no election had in fact been made. *R.* v. *Corporation of Bedford.* 1 E. R. 79

15. A charter having granted that upon the death or a motion of a principal burgess (who is appointed to hold for life) it should be lawful for the mayor and the remaining principal burgesses, *within eight days next following*, to elect another; the eight days after a vacancy having slipped without an election, a mandamus was granted upon the stat. 11 *G.* 1. *c.* 4. § 2. to make an election. *R.* v. *The Mayor, &c. of Thetford.* 8 E. R. 270

16. If, on an appeal against overseers' accounts, the Sessions disallow some of the items, and do not order the overseers to pay the balance to the successors, two justices out of sessions may enforce payment of the balance; and if they refuse to interfere, this court will grant a *mandamus* to compel them to hear the complaint.
R. v. *Carter.* 4 T. R. 246

17. Where a parish consists of several townships, some of which maintain their own poor, and have overseers separately appointed, the court will grant a *mandamus* for the separate appointment of overseers for the remaining townships. *R.* v. *Sir W. Horton & al.* 1 T. R. 374
(And see *R.* v. *Newell*, 4 T. R. 266. tit. POOR OVERSEERS I.)

18. The statute 35 *G.* 3. *c.* 101. § 2. after enabling justices to suspend orders of removal of poor persons, and to order the charges thereby incurred to be defrayed by the pauper's parish, and to direct the charges to be levied by warrant of distress, enacts, that if the parties against whom it is issued are out of the jurisdiction of the justice granting the warrant, it shall be indorsed by some other justice within whose jurisdiction they are: this is peremptory upon the latter upon request made.
R. v. *Kynaston.* 1 E. R. 117

19. Where the father and son were removed from *A.* to *B.* by two several orders of removal; and the parish officers of *A.* and *B.* agreed that the removal of the son should follow that of the father, without the expense of a separate appeal; in consequence of which an appeal was only entered against the order removing the father; and after the sessions had determined that the father was settled in *A.*, and had quashed that order, *A.* refused to take back the son; *B.* *R.* granted a *mandamus* to the sessions to receive and determine the appeal against the order removing the son, though at a subsequent sessions to that holden next after the order of removal made; the appeal being directed to be entered *nunc pro tunc* with proper continuances. *R.* v. *The Justices of Wiltshire.* 1 E. R. 683

20. A *mandamus* was granted to the sessions to receive an appeal which was presented during the next sessions after an order of removal made, though not presented till after the day on which, by the practice of that sessions, appeals were required to be entered.
R. v. *The Justices of Leicester, East* 23 *G.* 3. *(cited.)* 1 E. R. 686

II. *On what other Grounds granted or refused.*

1. The court will not grant a *mandamus* to a ministerial officer, such as the treasurer of a county, to obey an order of the Court of Quarter Sessions; but the proper remedy in case of his refusal to obey such order is by indictment. *R.* v. *Bristow.* 6 T. R. 168
2. An act of parliament for maintaining the poor at *Southampton*, and for other purposes, and incorporating the guardians, power is given to the guardians to raise money for certain purposes, and to appoint a treasurer who is to account to them and pay over, &c. according to their order; and an appeal is given to the Quarter Sessions against any thing done under the act, who have power to make such order therein, "either by directing the money to be returned, or otherwise as to them shall seem meet:" the guardians ordered the treasurer to pay a sum of money for a purpose different from those mentioned in the act, against which an appeal was entered at the sessions, where that sum was disallowed in the account, and the treasurer who had paid it was ordered to repay it to the succeeding treasurer: this court refused to grant a *mandamus* to compel the late treasurer to pay over the money according to the order of Sessions, because he was a ministerial officer, and bound to obey the order of the guardians.
R. v. *C. Shaw.* 5 T. R. 549
3. Wherever a party has a specific legal remedy, the Court of K. B. will refuse to grant a *mandamus*. 1 T. R. 396
4. A *mandamus* to a bishop to license a curate of an augmented curacy, where there was a cross examination, refused, *because* the party had another *specific legal remedy* by *quare impedit*.
R. v. *the Bishop of Chester.* 1 T. R 396
5. A *mandamus* to the mayor of *Colchester* to admit a recorder of that borough refused, because there was a recorder *de facto*, and the parties had another remedy by *quo warranto:* though both of them claimed under the same election. *R.* v. *the Mayor of Colchester.* 2 T. R. 259
6. Upon affidavits that one of two candidates for an office had a majority, only by means of illegal votes, the court granted a *mandamus*, to the corporation to admit and swear in the other who appeared upon the affidavits to have the greater number of legal votes; and this although the first, was admitted, and sworn into the office; there being no other specific, or at least no other so convenient mode of trying the right. *R.* v. *The Corporation of the Bedford Level.* 6 E. R. 356
(And see CORPORATION IV. 19. and QUO WARRANTO III.)
7. On a commission of charitable uses it was agreed between the lord of the manor of *A.* and the inhabitants of *W.* within the manor, that certain copyhold lands should be let for the maintenance of a stipendiary curate of the chapel of *W.* to be nominated by a majority of the inhabitants, and to be allowed by the lord, and by him presented to the ordinary for a licence to preach; the usuage of nominating, &c. had been pursuant to the agreement; and now the lord having refused to allow and present the nominee of the majority of the inhabitants, the latter prayed a *mandamus*, which the court refused; for their right is either a mere trust, and then their remedy is in equity; or it is a legal right. and then a *quare impedit* will lie.
R. v. *Marq. of Stafford.* 3 T. R. 646
8. In the case of a private eleemosynary lay foundation, if no special visitor be appointed by the founder, the right of visitation, in default of his heirs, devolves upon the king, to be exercised by his great seal; and on that ground the court refused to interfere by *mandamus* to compel the master and fellows of *St. Catherine's Hall, Cambridge,* to declare one of their fellowships vacant, and to proceed to a new election. *R.* v. *St. Catherine's Hall, Cambridge.* 4 T. R. 233
9. *Mandamus* to the churchwardens to make a church-rate refused, it being a subject of ecclesiastical jurisdiction.
R. v. *The Churchwardens of St. Peter, Thetford.* 5 T. R. 364
10. A rate to *reimburse* churchwardens such sums as they had expended, or might thereafter expend, on the parish church, would be bad on the face of it, as in part *retrospective;* and therefore the Court would not grant a *mandamus* to the chapelwardens of a township within the parish to make such a rate for raising their accustomed proportion of the whole: and their refusal to make such a rate, when demanded, applying as well to the form

as to the substance of the demand, the court would not grant the *mandamus* to raise the money in the common form of such a rate *prospectively*, out of which the churchwardens might repay themselves. *R.* v. *Haworth Chapelwardens.* 12 E. R. 556

11. The Court of K. B. will not grant a *mandamus* to a bishop to license a lecturer without the consent of the rector, where such lecturer is supported by voluntary contributions, unless an immemorial custom to elect without such consent is shewn.

R. v. *the Bp. of London* 1 T. R. 313

11. Where no immemorial custom appeared to appoint a lecturer in a parish church, and on the contrary it appeared that the lectureship was founded in 1658, when the episcopal constitution was suspended, and consequently there could not be the joint assent of the bishop, the rector, and the vicar, to the endowment; a *mandamus* to the bishop to license a lecturer, *without the assent of the vicar*, was denied; though it appeared that the lectureship was originally endowed by the rector, with an annual stipend payable out of the impropriate rectory, and that several lecturers had from time to time been accepted by the bishops and vicars for the time being.

R. v. *the Bp. of Exeter.* 2 E. R. 462

13. An immemorial custom for the inhabitants of a parish to elect a lecturer is binding on the rector: but where there is no such custom, and the lecturer has been paid out of the poor rates, the court will not grant a *mandamus* to the rector to certify to the bishop the election of a lecturer chosen by the inhabitants.

R. v. *Field.* 4 T. R. 125

14. And where a *mandamus* to the ordinary, to licence a curate, only stated that he had been duly nominated and appointed by the inhabitants to be curate, without stating either the consent of the rector, or any custom for the inhabitants to made such nomination and appointment, the Court quashed the writ, upon the grouud that the writ should have stated those facts which constituted the duty of the ordinary and induced an obligation upon him in point of law to do the act required.

R. v. *Bishop of Oxford.* 7 E. R. 345

15. Where the minister of an endowed dissenting meeting-house had been expelled by a majority of the congregation, the court refused a *mandamus* to *restore* him, which was applied for in order to enable him to justify his conduct, because it did not appear that he had complied with all the requisites necessary to give him a *primâ facie* title.

R. v. *Jotham.* 3 T. R. 575

16. Where there is no regular presiding sworn officer at an election, (*e. g.* of churchwardens, one of whom by custom was chosen by parishioners paying scot and lot, and the other appointed by the rector, which latter in fact presided), the control of the election devolves at common law upon the electors themselves: but unless there be a custom to regulate the time for making such election, it is not competent to a majority of the electors assembled at the time of such election to narrow the period which the common law would allow; and therefore a resolution by them, that it shall conclude at a given time, must at least limit a time reasonable in itself with respect to numbers and distance, and be of sufficient notoriety. But whether a resolution by a majority of the vestry, on the first day of the election, to close the poll at four o'clock on the next day, in a parish where the number of electors did not exceed 180, and where the affidavits stated a custom for 200 years, not to keep the poll open for more than two days, and no instance within living memory of extending it beyond four o'clock on the second day, were sufficient to warrant the closing of the poll at that time, while some of the voters were still coming in to poll, and others had no notice of the resolution, was a fit question to be tried upon a *mandamus*. *R.* v. *Winchester Bp's Commissary.* 7 E. R. 573

17. Upon application for a *mandamus* to be *restored*, the party must shew a *primâ facie* title, because he may, if properly admitted, have another remedy: *Secus* on a *mandamus to admit.* 3 T. R. 575

18. A *mandamus* refused to restore to the office of clerk of the Bridge-house estates in *London*, though the party was irregularly suspended, it appearing on his own shewing that there was good ground for the suspension, if the proceedings had been regular.

R. v. *Mayor of London.* 2 T. R. 177

19. Where a corporator, who was entitled to a dividend of certain profits, arising from a fishery which was en-

joyed in partnership by the corporators, was *suspended* from such profits until he paid a fine imposed by a bye law, the Court refused a *mandamus* to restore him to him to office; he having a remedy by action and in equity for the share of the profits, if unjustly withholden from him, and the suspension not being equivalent to a *a removal*.
R. v. *Whitstable Fishery Corporation.* 7 E. R. 353

20. *Mandamus* to the mayor, *&c.* of *London*, to admit a person to the office of auditor of the Chamberlain's and Bridgemaster's accounts, who had served it three years successively, and been elected again the fourth year by the livery, refused; because the custom of the city appeared to be, *that no person should be elected to, or serve, the said office for more than two years successively.* *R.* v. *the Mayor of London.* 1 T. R. 423

21. The publication of a pamphlet against the established religion in the university of *Cambridge*, is an offence within one of the statutes of the university, and punishable by banishment by the vice chancellor, assisted by the heads of colleges in the vice chancellor's court: and though the statute inflicting that punishment adds, that the party shall be banished from his college, this court will not grant a *mandamus* to restore a person to the franchises of the university against whom only banishment from the university is pronounced in the above court.
R. v. *Camb. University.* 6 T. R. 89

22. A *mandamus* to the steward of a manor to admit a copyholder, claiming by descent, refused, because he had a complete title against all the world but the lord without admittance.
R. v. *Rennett.* 2 T. R. 198

23. If the lord of a manor refuse to admit a person to whom a copyhold is surrendered on account of a disagreement respecting the fine to be paid, the court will grant a *mandamus* to compel the lord to admit without examining the right to the fine: for no right to the fine can arise till admittance. *R.* v. *the Lord and Steward of the Manor of Hendon.* 3 T. R. 484

24. A *mandamus* lies to the lord and steward of a manor to admit one to a copyhold tenement who has a *prima facie*, legal title in order to enable him to try his right; though equity had before refused to compel the lord to admit him for want of his shewing an equitable right to the property. But if there be a claim of a previous fine due to the lord in respect of the ancestor from whom the party claims, the rule will only be granted on payment of such fine *or fines* as shall be due. *R.* v. *Coggan & al.* 6 E. R. 431

25. A similar *mandamus* was just before granted to the Duke of *Leeds* to admit Mr. *Conolly* to certain customary tenements in the manor of *Wakefield* in *Yorkshire*, to enable him to try his title thereto. *ib.* 432

26. If trustees under a road act turn a road through an inclosure, and make the fences at their own expense, and repair them for several years, the court will not compel them by *mandamus* to continue such repairs, unless there be a special provision in the act to that effect. *R.* v. *the Commissioners of the Llandillo District, &c.* 2 T. R. 232

27. A *mandamus* to country justices, to rate a parish within their jurisdiction in aid of another parish, lying within a borough, which has an exclusive jurisdiction, refused; because they have no means of inquiring into the complaint.
R. v. *T. Holbech.* 4 T. R. 778

28. The court will not grant a *mandamus* to magistrates to order them to issue warrants of distress to levy a poor-rate on certain persons who have refused to pay, unless those persons have been previously summoned by the justices: but they will grant a *mandamus* to them to receive complaints, *&c.* against the persons who refuse to pay, *&c.* and to proceed thereupon to levy, *&c.*
R. v. *Bent & al.* 6 T. R. 198

29. *Mandamus* granted to compel a mayor and the capital burgesses of a corporation to fill up two vacancies occasioned by the death of two capital burgesses, though there was an information in nature of a *quo warranto* depending against the mayor, questioning his title.
R. v. *Grampond (Corp.)* 6 T. R. 301

30. In a *mandamus* to a company in a corporation to compel them to inrol indentures of apprenticeship, it is sufficient to state generally that those who have served a free burgess, &c. under indentures of apprenticeship, and whose indentures have been in-

rolled, are entitled to be admitted to their freedom; that *A. B.* had served, &c. that his indentures ought to have been inrolled on being tendered, &c. and that they were tendered for that purpose, but that the defendants refused to inrol them. *R.* v. *Coopers' Company of Newcastle on Tyne.* 7 T. R. 543

III. *Costs on.*

In future if an application is made to the court for a *mandamus* to a bishop to license, &c. without good foundation, as if there is a specific legal remedy for the party, they will discharge the rule with costs.

R. v. *Bp. of Chester.* 1 T. R. 405

IV. *Returns to.*

1. If a return to a *mandamus* consist of several independent matters, not inconsistent with each other, but part of them good in law and part bad, the court may quash the return as to such part only as is bad, and put the prosecutor to plead or traverse the rest.
R. v. *the Mayor, &c. of Cambridge.* 2 T. R. 456
2. If two or more inconsistent causes be returned to a *mandamus*, the court will quash the whole return. 2 T. R. 456: and *R.* v. *the Mayor of York.* 5 T. R. 66
3. That *A.* was not a burgess; that he was not eligible to the office of common-councilman; and that he was not elected, are not inconsistent returns. 2 T. R. 456
4. It is inconsistent to state in a return to a *mandamus* (to certify the election of a recorder, supposed in the writ to be on the 15th of *January*) that the corporation were not then duly assembled; and afterwards to state the election of another corporate officer, *to wit, on the 15th of January.* The day in such a case is material: and then its being laid under a *viz.* does not make any difference. 5 T. R. 66
5. A return to such a *mandamus*, that the corporation were not duly assembled to proceed to the election of a recorder, is bad; because it contains a negative pregnant. 5 T. R. 66
6. If the writ set forth all the proceedings of the election, concluding, "by reason whereof *A.* was elected," it is a bad return to say that he was not elected: the defendant should traverse one of the facts alleged. 5 T. R. 66
7. It is a good return to a *mandamus* (to the ordinary to grant a licence to a schoolmaster), to state that he had suspended granting his licence until the party would submit himself to be examined touching his sufficiency in learning. 6 T. R. 490 (See tit. SCHOOL.)
8. A return (by a rector to a *mandamus* to restore a parish clerk) held insufficient, because it did not state that the party had been summoned to answer to a charge, before he was removed.
R. v. *Gaskin, D.D.* 8 T. R. 209
9. In a return to a *mandamus* to a corporation to restore a member who had been removed, it should appear that the body removing had proved the charge for which the member was removed: it is not sufficient to state merely that he was present when the charge was made and did not deny it.
R. v. *Faversham Fishermen's Company.* 8 T. R. 352
10. Affirmed by Lord *Kenyon* C. J. and *Lawrence* J., in *Harman* v. *Tappenden.* 1 E. R. 562-3
11. The court will not quash a return to a *mandamus* (which directed an inferior court to give judgment on an indictment) merely because it states an erroneous judgment given below; but a writ of error must be brought to reverse the judgment.
R. v. *the Justices of the W. R. of Yorkshire,* 7 T. R. 467
12. After a return has been made to a *mandamus*, the defendant cannot make any objection to the writ itself. 5 T. R. 66
13. Though by the statute *9 Ann. c.* 20. § 2. the prosecutor of a *mandamus* to which there is a return, and issue taken on the facts therein, had an option to try the question in the same county in which he might have brought an action for a false return; yet if all the material facts are alleged in one county, and issue taken thereon there, he cannot issue the *venire facias* into taken thereon there, he cannot issue another county, though he might originally have alleged the facts there, and have there brought his action for a false return. *R.* v. *the Mayor &c. of Newcastle,* 1 E. R. 114

MANOR.

1. If a lord of a manor convey a customary estate to the tenant, he cannot reserve to himself the ancient services; for the tenant by reason of the statute of *quia emptores* must then hold of the superior lord.

Bradshaw v. *Lawson*. 4 T. R. 443

2. The customary tenements in the north of *England*, which are parcels of the respective manors in which they are situate, and descendible from ancestor to heir by the hereditary right called tenant right, and held by the lord according to the custom, are not within the statute of partition.

Barrell v. *Dodd*. 3 B. & P. 378

3. Where the lord of a customary manor, by his deed, made since the statute of *quia emptores*, granted to his customary tenant, who then held by the payment of certain customary rents and other services, that in consideration of a 61 penny fine (or 61 years rent), he, the lord, *ratified and confirmed* to the tenant and his heirs *all his customary and tenant right estates*, with the appurtenances, &c. and granted that the tenant and his heirs should be thereof *freed, acquitted, exempted, and discharged from the payment of all rents, fines, heriots, &c. dues, customs, services, and demands*, at any time thereafter happening *to become due* in respect of the tenancy; *except* one penny yearly rent, and also *excepting and reserving* suit of court, with the service incident thereto; and *saving and reserving* all royalties, escheats, and forfeitures, and all other advantages and emoluments belonging to the signory, so as not to prejudice the *immunities* thereby granted to the tenant; and also granted liberty to cut timber, and to sell or lease, &c. without licence: held, that such *confirmation* to the tenant of his customary and tenant-right estate, freed, &c. from all rents and services, except, &c. was tantamount to a release of those rents and services not specifically excepted; and that by virtue thereof, the customary tenement became frank-fee, or held in free and common socage; and that the old customary estate, which before was not devisable, was extinguished, and became thereupon devisable by the statute of wills. Such customary estates, which are peculiar to the north of *England*, are not freehold, but seem to fall under the same general consideration as copyholds; alienable by bargain and sale, and admittance thereon, and not holden at the will of the lord. *Doe d. Reay* v. *Huntington*. 4 E. R. 271

4. Where there is a grant of a particular thing once sufficiently ascertained by some circumstance belonging to it, the addition of an allegation, mistaken or false, respecting it, will not frustrate the grant: but where a grant is in *general* terms, there the addition of a *particular* circumstance will operate by way of restriction and modification of such grant.

Roe d. Conolly v. *Vernon*. 5 E. R. 51

5. Therefore where one having customary tenements, *compounded and uncompounded*, surrendered to the use of his will "*all and singular the lands, tenements, &c. whatsoever, in the manor which he held of the lord by copy of court-roll*, in whose tenure or occupation soever the same were, *being of the yearly rent to the lord in the whole of* 4*l.* 10*s.* 8½*d.*, *and compounded for*:" held that the words "*and compounded for*," restrained the operation of the surrender to that description of copyholds then belonging to the surrenderor. And that the words "*being of the yearly rent, &c. of* 4*l.* 10*s.* 8½*d.*," which were not referable to any actual amount of his rents, either compounded or uncompounded, though much nearer to the whole than to the compounded only, could not qualify or impugn that restriction. *ib.*

(And see DEVISE II. 11.)

6. In a *quo warranto* information the defendant relied on an election, to the office of Port Reeve, by a homage consisting of twenty-three free tenants; the jury found, on a special verdict, that twenty one of those persons were not free tenants; and this court held the election to be void.

R. v. *Mein*. 4 T. R. 480

7. The lord of a manor, to whom the grant of a market is made *infra villam de W.* may hold it any where *infra villam de W.*: and whether *villa* extend to the town of *W.*, or the township or parish of *W.*, the lord has a right to remove the market-place from one situation to another within the precinct of his grant. And though he should have holden it for above 20 years within the township of *W.*, where the grant only gave it him within the town properly so called at the time, yet if he afterwards give notice

of the removal to another place in the township, the public have no right to go upon his soil and freehold in the old market-place; and any person going there is liable to an action of trespass by the lord.

Curwen v. *Salkeld.* 3 E. R. 538

8. The lord of a manor, as such, has no right, without a custom, to enter upon the copyholds within the manor, under which there are mines and veins of coal, in order to bore for and work the same: and the copyholder may maintain trespass against him for so doing. *Bourne* v. *Taylor.* 10 E. R. 189

9. But, where the defendant justified under the lord, as being seised in fee of the veins of coal lying under the copyhold tenements, *together with the liberty of boring for and getting the coal*, &c. it is not enough for the plaintiff to reply, that as well all the veins of coal under the said closes in which &c. as the rest of the soil within and under the same, had immemorially been parcel of the manor and demised and demiseable by copy, &c. without any exception or reservation of the coal, &c.; unless he also traverse *the liberty* of working the mines: because the plea claims such liberty not merely as annexed to the seisin in fee, to be exercised when in actual possession, but as a present liberty, to be exercised during the continuance of the copyholder's estate: and therefore the replication is only an argumentative denial of the liberty, and does not confess and avoid it. 10 E. R. 189

10. Though the lord of a manor in *Cornwall* may by conveyance and acts of ownership establish his right to all tin mines within the manor, as well under the freehold tenements as under customary tenements and the wastes; yet consistently therewith, the tenants of certain tenements in a vill within the manor, some of them freehold and some customary, may by acts of ownership for more than twenty years past establish their right to copper mines, as well under the waste and customary lands, as under the freehold lands within the vill.

Curtis v. *Daniel.* 10 E. R. 273

11. To constitute a court baron, it must be held before two free suitors at least. *ibid. Rumsey* v. *Walton, Hereford Summ. Ass.* 1760, *cor. Foster* J. 4 T. R. 416

12. An allegation in a declaration that one was seised of a *manor* of F., and that he and all those whose estates he has in the *said manor* have immemorially appointed a sexton of the parish of F., is sustained by proof of his seisin of a *quondam manor*, which had ceased to be a legal manor for defect of freehold tenants, and existed now only by reputation.

Soane v. *Ireland.* 10 E. R. 259

MARRIAGE.

1. Bastards are within the meaning of the marriage act, stat. 26 *G.* 2. *c.* 33. which requires the consent of the father, guardian, or mother to the marriage of persons under age, who are not married by banns.

R. v. *Hodnet.* 1 T. R. 96

2. All marriages, whether of legitimate or illegitimate children, are within the general provisions of the marriage act 26 *G.* 2. *c.* 33. which requires all marriages to be by banns or licence: and, by three judges, a marriage of an illegitimate minor had by licence with the consent of her mother is void by the 11th section; the words father and mother in that section meaning legitimate parents: by one judge, it is *casus omissus* in the act, and the marriage good.

Priestley v. *Hughes.* 11 E. R. 1

3. A marriage, celebrated *bona fide* in *Scotland*, will undoubtedly entitle the woman to dower in *England.*

Ilderton v. *Ilderton.* 2 H. B. 145

4. And the lawfulness of such a marriage may be tried by a jury in *England.*

2 H. B. 145

5. Evidence that *British* subjects in a foreign country, being desirous of intermarrying, went to a chapel for that purpose where a service in the language of the country was read by a person habited like a priest, and interpreted into English by the officiating clerk; which service the parties understood to be the marriage service of the church of *England*; and they received a certificate of the marriage which was afterwards lost; is sufficient whereon to found a presumption (nothing appearing to the contrary) that the marriage was duly celebrated according to the law of that country, particularly after 11 years cohabitation as man and wife till the period of the husband's death; and such British subjects being attached at the time to the British army on service in such foreign country and having military possession of the place, it seems that such marriage solemnised by a

priest in holy orders (of which this would be reasonable evidence) would be a good marriage by the law of *England*, as a marriage contract *per verba de præsenti* before the marriage act; marriages beyond sea being excepted out of that act; and it would make no difference if solemnized by a Roman catholic priest.

R. v. *Brampton Inhab.* 10 E. R. 282

MORTGAGE.

1. If a subsequent purchaser or mortgagee has notice of a former purchase or incumbrance, he shall not avail himself of an assignment of an old outstanding term, prior to both, in order to get a preference. *Willoughby* v. *Willoughby. (in Chanc.)* 1 T. R. 763
2. But if he had no notice of such prior incumbrance or purchase, and has the first and best right to call for the legal estate, then, if he gets an assignment of it, a court of equity will not deprive him of his advantage. 1 T. R. 763
3. If a second mortgagee lend his money upon an estate, upon which there is an old outstanding term, and has notice at the same time of a certain incumbrance prior to his own, the prior incumbrancer having the best right to call for the legal estate, may satisfy himself of any other incumbrances upon the estate, although they were not known to the second mortgagee at the time he advanced his money. 1 T. R. 763
4. For the relative situations and powers of mortgagor and mortgagee.

   See *Birch* v. *Wright.* 1 T. R. 383
5. Where an old mortgage term of 1000 years, created in 1727, was recognized in a marriage settlement by the owner of the inheritance in 1751, by which a sum was appropriated to its discharge; and no further notice was taken of it till 1802, when a deed, to which the then owner of the inheritance and the representatives of the termors were parties, reciting that the term was still subsisting, conveyed it to others to secure a mortgage; held, that it could not be presumed to have been surrendered against the owner of the inheritance, who was interested in upholding it. *Doe d. Graham* v. *Scott.* 11 E. R. 478

N

NAVAL STORES.

1. A person convicted of concealing naval stores may be adjudged to pay a penalty of 200*l.*, or to be punished corporally, at the election of the court, under statutes 9 & 10 *W.* 3. *c.* 41. § 2.: 9 *G.* 1. *c.* 8. § 4.: and 17 *G.* 2. *c.* 40. § 10.

   R. v. *W. Bland.* 5 T. R. 370
2. And a delinquent may be adjudged under those statutes to pay the whole penalty of 200*l. and the costs. R.* v. *Chapple. T.* 34 *G.* 3. 5 T. R. 371, *n.*

NAVIGATION SHARE.

By a navigation-act the shares were declared to be vested in the subscribers their executors, and *assigns*, with power to the subscribers to assign their shares; and a committee to be appointed under the act were authorised to make calls on the proprietors of shares at such time as they should think fit; held, that an original subscriber is not liable for any call made by the committee after assigning his share.

The Huddersfield Canal Company v. *Buckley.* 7 T. R. 36

NEW TRIAL.

1. A new trial granted in a civil case in the time of *Edw.* 3. 6 T. R. 623, *n.*
2. Value and importance are not of themselves sufficient grounds for granting a new trial, unless there be also some doubt in the question; though they frequently weigh in obtaining a rule to shew cause why there should not be a new trial.

   Vernon v. *Hankey.* 2 T. R. 113
3. The court will not grant a new trial to let the party into a defence of which he was apprised at the first trial. 2 T. R. 113
4. A new trial refused which would have given the defendant an opportunity of proving the illegality of a

policy, which was not illegal on the face of it; for he should have shewn it on the trial.

Gist v. *Mason.* 1 T. R. 84

5. An objection to the competency of witnesses, discovered after a trial, is not a sufficient ground of itself for granting a new trial: but it may have some weight with the court where the party applying appears to have merits. *Turner* v. *Pearte.* 1 T. R. 717

6. Where a new trial was granted upon a new ground, not opened at the first trial, it was ordered to be upon payment of costs.

Sutton v. *Mitchell.* 1 T. R. 20

7. The court may in any case grant a new trial upon the ground of excessive damages. *Ducker* v. *Wood.* 1 T. R. 277

8. In an action on the case for diverting the plaintiff's watercourse, where the jury under circumstances of aggravation, gave 3000*l.* damages; the court granted a new trial on the ground that the damages given greatly exceeded the amount of the injury proved: but they directed that the former verdict should stand as a security in the meantime for the damages which might be given on the second trial.

Pleydell v. *Ld. Dorchester.* 7 T. R. 529

9. The court will not grant a new trial in an action for criminal conversation merely because the damages appear to them to be excessive.

Duberley v. *Gunning.* 4 T. R. 651

10. But if, in such action, they are satisfied that the jury acted under the influence of undue motives, or of gross error or misconception, they will.—

Chambers v. *Caulfield.* 6 T. R. 244

11. A new trial will be granted on account of excessive damages in an action for an assault and battery.

Jones v. *Sparrow.* 5 T. R. 257

12. The Court of K. B. said, that where the jury had found a verdict for the plaintiff upon a presumption contrary to evidence, the court will not grant a new trial, if the plaintiff be entitled to recover in conscience and equity. *Wilkinson* v. *Payne.* 4 T. R. 468

13. So in the Court of C. P. where no point had been saved at the trial, a new trial was refused to be granted on a question of law, the justice and conscience of the case being with the verdict. *Cox* v. *Kitchin.* 1 B. & P. 338

14. Where a new trial is moved for on the ground of a misdirection in point of law, if the court see that justice has been done between the parties, they will not set aside the verdict, nor enter into a discussion of the question of law. *Edmonson* v. *Machell.* 2 T. R. 4

15. On a motion for a new trial by a defendant, in an action against him for goods delivered to the use of a third person, on his undertaking to see the plaintiff paid, the court will take into consideration, not only the expressions used, but the particular situation of the defendant at the time of his undertaking, and the amount for which he will thereby be made liable.

Keate v. *Temple.* 1 B. & P. 158

16. If the testimony of witnesses on which a verdict has proceeded, be founded on, and derive its credit from, particular circumstances, and those circumstance be afterwards clearly falsified by affidavit; the court will grant a new trial.

Lister one, &c. v. *Mundell.* 1 B & P. 427

17. It is no ground for the court to grant a new trial that a witness called to prove a certain fact was rejected on a supposed ground of incompetency, where another witness who was called established the same fact, which was not disputed by the other side; and the defence proceeded upon a collateral point, upon which the verdict turned. *Edwards* v. *Evans.* 3 E. R. 451

18. Defendant brought a writ of error on the first day of term; obtained a rule *nisi* for a new trial on the second; and justified bail in error before cause shewn; this was held to be no objection to his supporting the rule for a new trial, as a point of importance was depending, which would have been shut out in the court of error

Hemmett & al. v. *Lea (Bart.)* M. 38 G. 3. 1 B. & P. 149, *n.*

19. The court will grant a new trial in a penal action after verdict for defendant on account of a mistake or misdirection of the judge.

Wilson v. *Rastall.* 4 T. R. 753: & *Calcraft* v. *Gibbs.* 5 T. R. 19

20. The court will not grant a new trial in a penal action, where a verdict has passed for the defendant on the ground of its being against the evidence.

Brook q. t. v. *Middleton.* 10 E. R. 268

21. In case of felony, no new trial can be granted. 6 T. R. 638

22. But in the case of a misdemeanor the court are not fettered with any rules in granting a new trial, but will either grant or refuse a new trial as it will tend to the advancement of justice.

6 T. R. 638

23. Where several defendants are tried at the same time for a misdemeanor, some of whom are acquitted and some convicted, the court may grant a new trial as to those convicted, if they think the conviction improper. *R.* v. *Mawbey (Bart.) & al.* 5 T. R. 619

24. All the defendants convicted upon an indictment for a conspiracy must be present in court when a motion for a new trial is made on behalf of any of them. *R.* v. *Teal & al.* 11 E. R. 307

25. A new trial may be granted in an information in nature of a *quo warranto*. *R.* v. *Francis.* 2 T. R. 484

26. A defendant, convicted on a criminal prosecution, cannot move for a new trial after the first four days of the next term: though if it appear to the court at any time before judgment that injustice has been done by the verdict, they will interpose and grant a new trial.
R. v. *Holt.* 5 T. R. 436

27. The court refused to grant a rule *nisi* for a new trial after a verdict for the defendant upon an indictment for non-repair of a church-yard fence, which was moved on the ground of the verdict being against evidence.
R. v. *Reynell, Clerk.* 6 E. R. 315

28. A verdict having passed for the defendants in an action to recover the amount of the re-exchange upon the dishonour of a bill drawn from *London* on *Lisbon*, upon evidence that the enemy were in possession of *Portugal* when the bill became due, and *Lisbon* was then blockaded by a *British* squadron, and there was in fact no direct exchange between *Lisbon* and *London*, though bills had in some few instances been negociated between them through *Hamburgh* and *America* about that period; the Court refused to grant a new trial, on the presumption that the jury had found their verdict upon the fact, that no re-exchange was proved to their satisfaction to have existed between *Lisbon* and *London* at the time; the question having been properly left to them to allow damages in the name of re-exchange, if the plaintiff, who had indorsed the dishonoured bill to the holder, had either paid or were liable to pay re-exchange; and saving the question of law, whether any exchange or re-exchange could be allowed between this and an enemy's country.
De Tastet v. *Baring.* 11 E. R. 265

29. The Court of C. P. will not grant a new trial on account of a verdict being against evidence where the damage to be recovered, would not exceed 5*l*.
Roberts v. *Carr.* 1 W. P. T. 495

NOTICE.

1. Generally speaking, where it is required by law that notice shall be given to a party before he shall be affected by any act, leaving it at his dwelling-house is sufficient. 4 T. R. 465

2. But it is otherwise in the case of process to bring a party into contempt; there personal notice is necessary.
4 T. R. 466

3. In some instances however of process, leaving it at the house is sufficient; as a subpœna out of Chancery, or a *quo minus* out of the Exchequer.
4 T. R. 465

4. Where the tenant of an estate holden by the year has a dwelling-house at another place, the delivery of a notice to quit, to his servant at the dwelling-house, is strong presumptive evidence that the master received the notice and ought to be left to the jury.
Jones d. Griffith v. *Marsh.* 4 T. R. 464

NUISANCE.

1. A parol licence to put a sky-light over the defendant's area (which impeded the light and air from coming to the plaintiff's dwelling-house through a window) cannot be recalled at pleasure after it has been executed at the defendant's expense; at least not without tendering the expenses he had been put to: and therefore no action lies for a private nuisance, in stopping the light and air, &c. and communicating a stench from the defendant's premises to the plaintiff's house by means of such sky-light.
Winter v. *Brockwell.* 8 E. R. 308

2. Where lights had been put out and enjoyed without interruption for above 20 years, during the occupation of the opposite premises by a tenant; that will not conclude the landlord of such opposite premises without evidence of his knowledge of the fact: which is the foundation of presuming a grant against him, and consequently will not conclude a succeeding tenant, who was in possession under such landlord, from building up against such encroaching lights. *Daniel* v. *North.* 11 E. R. 372

3. The action upon the case for a nuisance is local in its nature, and the nuisance must be proved to have been committed in the county where the venue is laid. If no place and county is alleged where the nuisance is committed, the county in the margin shall be intended.

Warren v. *Webbe.* 1 W. P. T. 379

O.

OFFICE AND OFFICER.

1. The crown may exempt persons from serving the office of constable, or any other office under the crown, provided there be a sufficient number of persons left to serve the office.

R. v. *T. Clarke.* 1 T. R. 686

2. A younger brother of the *Trinity-House* is not exempt from serving the office of headborough or constable, by any of the charters granted to the corporation. 1 T. R. 685

3. An officer of the Customs is exempted from serving the office of overseer of the poor, though he has not his writ of privilege at the time.

R. v. *Warner.* 8 T. R. 375

4. A certificate granted upon 10 11 *W.* 3. *c.* 22. exempting the person prosecuting to conviction any one guilty of burglary from serving *Parish* and *Ward* offices exempts the party from the office of petty constable for a township within, but not co-extensive with the parish where the burglary was committed. *Mosely (Bart.)* v. *Stonehouse.* 7 E. R. 174

5. When an immemorial privilege is claimed for *all* the officers of a court of justice, and new officers are made within the time of legal memory, they must also fall within the privilege.

Wilkes v. *Williams.* 8 T. R. 634 (And see 8 T. R. 375.)

6. The privilege of officers of the Court of Chancery, to be impleaded in the Petty Bag office. 8 T. R. 631

7. One who has not taken the Sacrament within a year, being incapable of being elected into a corporate office by stat. 13 *Car.* 2. *c.* 12 his disqualification was held not to be removed by the annual act of indemnity (47 *G.* 3. stat. 2. *c.* 35.) the 6th sect. of which restrains its operation in cases where the office shall have been "already legally *filled up and enjoyed* by any other person," at the time of passing the act: the fact being, that the defendant and another were candidates at the time of election, when 40 electors were assembled; and after 2 electors had voted for each candidate, the candidates were asked whether they had previously taken the sacrament; to which the defendant answered in the negative, and the other candidate in the affirmative: whereupon notice of the defendant's incapacity was publicly given to the electors, and was heard by all who afterwards voted for the defendant, being 20 in number, except 2 or 3; and 16 afterwards voted for the other. Held,

1st, That all the votes given for the defendant after such notice were thrown away.

2dly. That the other candidate, having the greatest number of legal votes, was duly elected; though some of the defendant's votes (not being equal in number to the good votes ultimately given for the other) had voted before such notice.

3dly. That the presumption of law being that every person has conformed to the law till something appear to rebut that presumption; it must be taken that the other candidate, who affirmed his qualification, which was not negatived by the jury, was duly qualified and that such his election, perfected by swearing in, was a *filling up and enjoying* by him of the office, within the proviso of the indemnity act, so as to preclude its operation by relation in favour of the defendant.

R. v. *Hawkins.* 10 E. R. 211

8. The stat. 5 & 6 *E.* 6. prohibits the sale of certain offices. 8 T. R. 92

9. It is also illegal to sell many other public offices not within the stat. 5 & 6 *Edw.* 6. 8 T. R. 94

10. But offices not within the statute may be sold, provided the sale takes place with the consent of those who have the power of appointment. 8 T. R. 94 (See stat. 49 *G.* 3. *c.* 126.)

11. Where a corporation consists of a mayor, twelve jurats, freemen, and a

town clerk, which latter was elected by the others, and the jurats sit as judges in a court of record, and hold pleas of the crown, and any two of them with the mayor may hold a court, but all the jurats have a right to attend as judges, without being summoned, although there were many instances within the borough of *Hastings* of a jurat having held the office of town-clerk, yet the court held the offices to be incompatible 2 T. R. 81 (See tit. CORPORATION IV. 14, 15.)

12. Although the names of the clerk of assize and clerk of arraigns are inserted in the commissions of *oyer* and *terminer*, yet there never was an instance of their acting as judges, nor have they any authority to decide on any question. 2 T. R. 81

13. Suspension makes no vacancy in an office, it is only an impediment to the enjoyment of any benefit from it; but all acts which are required to be done by such officer must still be done by him to give them validity. *Per Holt in Phillips* v. *Bury*. 2 T. R. 351

14. The clerk of the papers in the King's Bench prison cannot act by deputy, but must himself reside within the prison. *In the matter of Bryant*. 4 T. R. 716; 5 T. R. 511

15. Clerk of the papers and clerk of the day-rules in the King's Bench prison removed by this Court for non-residence and misbehaviour, under statute 27 *G.* 2. *c.* 17. *Bryant's Case*. 5 T. R. 509

16. Where an act confers certain privileges on officers who may be sued for things done in pursuance of that act and a subsequent act imposes new obligations on the old officers, the privileges of the former statute do not attach on them in respect of things done under the latter. *Bazing* v. *Skelton*. 5 T. R. 16

17. Therefore toll-gate keepers sued for acts done under stat. 25 *G.* 3. *c.* 51. need not be sued in the county where the fact was committed, as they must be under stat 13 *G.* 3. *c.* 78. § 81. 5 T. R. 16

18. A church-warden making a distress for a poor-rate under a warrant of magistrates, is entitled to the protection of the statute 24 *G.* 2. *c.* 44. in having the magistrates joined with him as defendants in an action of trespass.—*Harper* v. *Carr*. 7 T. R. 270

19. Where goods were taken by constables, under a warrant of distress, granted by a justice of peace for the county of *Kent*, directed "to the constables of the Lower Half Hundred of *C.* and *G. in the county of* Kent;" which warrant recited that the plaintiff (whose goods were distrained) *of the parish of* G. *in the said county*, was ballotted for the militia of the said county and having refused to serve, &c. was convicted in a certain penalty; for levying which the warrant was granted; if it turn out that the warrant was executed within a certain part of the parish of *G.*, within the jurisdiction of the Cinque Ports, and *not within the county of* Kent, the constables are not within the protection of the statute, and may be sued in trespass without the magistrate's being made a defendant. *Milton* v. *Green & al.* 5 E. R. 233

20. A constable executing the warrant of a justice of peace, and sued in trespass, without the magistrate, is within the protection of the statute, and entitled to a verdict on proof of such warrant; having first complied with the plaintiff's demand of a perusal and copy of the warrant before the action brought, though not within *six* days after such demand, as the act directs. *Jones* v. *Vaughan*. 5 E. R. 445

21. If an officer seize goods in obedience to the warrant of a magistrate, whether that warrant be legal or not, he cannot be sued without a previous demand of a copy and perusal of the warrant. *Price* v. *Messenger*. 2 B. & P. 158

22. If the warrant be to seize "stolen goods," and he seize goods which turn out not to have been stolen, he is still within the protection of the statute. *ibid.*

23. Replevin is not an action within this statute. *Fletcher* v. *Wilkins*. 6 E. R. 283

24. The statute not being a penal act, the courts are not bound to construe it strictly; a demand of a copy of a warrant therefore under § 6. signed by the plaintiff's attorney for him, is, within the meaning of the statute, a demand signed by the plaintiff. *Buller* J. *Jory* v. *Orchard*. 2 B. & P. 42

25. A notice of action to a magistrate under this statute indorsed with the name of the plaintiff's attorney, and the words, "of *Birmingham*," as de-

scribing the place of his abode, held sufficient.

Osborn v. *Gough*. 3 B. & P. 551

26. The future half-pay of an officer in the army is not assignable. *Lidderdale* v. *The Duke of Montrose & al.* 4 T. R. 248

27. Creditors under the Lords' act may compel the debtor to include in his schedule every thing that he can sell for his own benefit; but as the half-pay of an officer is not the subject of sale, the creditors cannot compel him to include it in his schedule.

Flarty v. *Odlum*. 3 T. R. 681

28. Nor is the full pay of a military officer assignable.

Burwicke v. *Reade*. 1 H. B. 627

29. The several king's waiters in the port of *London* hold separate offices by different patents; and though the fees are in the first instance paid by the merchant in one entire sum to a common receiver for all: yet the aliquot shares of each are separate, and each is entitled to call for his share when in fact the sum so received is capable of being divided. These shares are now fixed by the stat. 38 *G.* 3. *c.* 86. at 19, and as the patentees die, the emoluments of each officer are to be carried to a superannuation fund, for the benefit of aged and disabled officers of the customs, and are not to be applied to the benefit of the surviving patent king's waiters which before that act had been practised.

Hudson & al. v. *Mucklow*. 12 E. R. 273

OUTLAWRY.

1. The stat. 25 *Ed.* 3 stat. 5. *c.* 14. does not apply to a court of *oyer* and *terminer* and gaol delivery. 4 T. R. 521

2. If it appear on the record that the writ of proclamation was delivered to the sheriff three months before the return of it, it is sufficient though it be not so expressly alleged.

4 T. R. 521

3. The writ of proclamation required the sheriff to proclaim the parties in *open court in the sheriff's county* (not saying county court), and held good.

4 T. R. 521

4. The names of the coroners need not be subscribed to the judgment of outlawry; if it appear on the record that the judgment of outlawry was given by them, it is sufficient. 4 T. R. 521

5. The sheriff need not allege in his return to the writ of proclamation, that "the persons proclaiming did not appear and render themselves," though he must in his return to the exigent.

4 T. R. 521

6. It need not appear on a record of outlawry that the *capias* and exigent were *sealed* by the justices of *oyer* and *terminer*, &c. 4 T. R. 521

7. The sheriff must state, in his return to the writ of exigent, the day and year of each exaction; stating that on such a day *in the 30th year of the reign*, he exacted the defendant a third time; that afterwards on such a day (omitting the year) he exacted him a fourth time; and that *afterwards*, on such a day *in the 30th year aforesaid*, he exacted him a fifth time is insufficient, and a good ground for reversing the outlawry.

R. v. *Almon (in error)* 5 T. R. 202

8. It need not be stated in express terms on a record of a judgment of outlawry that a writ of *capias* issued against the defendant; it is sufficient if it appear "that the sheriff was commanded *to take* the defendant," &c.

R. v. *S. Perry*. 6 T. R. 573

9. Neither is it necessary in stating every writ to repeat the day and year when each was issued; it will suffice if it appear by referring to the preceding parts of the record; as if, after stating that the *capias* was returned on such a day, it proceed thus, "*Whereupon* the exigent was awarded;" "whereupon" referring to the day when the *capias* was returned.

6 T. R. 573

10. If one exigent be awarded against the principal and accessory together, it is error only as to the latter.

4 T. R. 521

11. In a record of outlawry it appeared by the writ of proclamation and the return to it, that the prisoners were required to *render themselves to the sheriff so that he might have their bodies before the justices*, &c. at the return of the writ; and held good.

R. v. *Yandell*. 4 T. R. 521

12. Outlawry in felony reversed because it appeared on the writ of proclamation and the return to it that the person indicted was outlawed after a day had been given him in court, and before such day arrived. *Barrington* v. *The King (in error)*. 3 T. R. 499

13. A person outlawed on an indictment for sheep-stealing is ousted of clergy by 14 *G.* 2. *c.* 6. § 1.: "*outlawry*" being a "*conviction*" within the meaning of that statute.—(See CONVICTION II. 8.) 4 T. R. 521

15. The writ of *capias utl.* and the sheriff's return to it, ought to be filed with the clerk of the exigents.

Reynolds v. *Adams.* 3 T. R. 578

14. Upon a writ of error, prosecuted by the party in person, to reverse an outlawry in a civil action, for a common law error, the recognizance of bail is to be taken in the common alternative form, to pay the condemnation money or render the principal; and not absolutely to pay the condemnation, as in case of reversal of outlawry upon the stat. 31 *Eliz. c.* 3. for want of proclamations, or upon the stat. 4 & 5 *W. & M. c.* 18. § 3. on appearance by attorney and by motion.

Havelock v. *Geddes,* 12 E. R. 622

P.

PARTNERS.

(And see the References in Table of Titles.)

1. In order to constitute a partnership, *a communion of profit and loss* between the parties is essential; and this is the true criterion to judge by, where the question is, whether persons are partners or not? 1 H. B. 43. 48

2. *A.* having neither money nor credit, offers to *B.* that if he will order with him certain goods to be shipped upon an adventure; *if any profit should arise from them, B. should have half for his trouble: B.* having lent his credit on this contract, and ordered the goods on their joint account, which were furnished accordingly, and afterwards paid for by *B.* alone: held, that he was entitled to recover back such payment in assumpsit against *A.* who had not accounted to him for the profits; such contract not constituting a partnership as between themselves, but only an agreement for a compensation for trouble and credit; though *B.* were liable as a partner to third persons, creditors.

Hesketh v. *Blanchard & al.* 4 E. R. 144

3. Where one takes a moiety of the profits indefinitely, he shall, by operation of law, be made liable to losses. 2 H. B. 247

4. Where *A. B.* and *C.* had entered into an agreement to purchase goods in the name of *A.* only, and to take *aliquot* shares of the purchase, but it did not appear that they were jointly to resell the goods; the Court of C. P. (*Wilson J. diss.*) held that, on failure of *A.* the ostensible buyer, *B.* and *C.* were not answerable as partners with him.

Coope & al. v. *Eyre & al.* 1 H. B. 37

5. Acts subsequent to the time of delivering goods on a contract may be admitted as evidence to shew that the goods were delivered on a partnership account, if it were doubtful at the time of the contract; but if it clearly appear that no partnership existed at the time of the contract, no subsequent act by any person who may afterwards become a partner (not even an acknowledgment that he is liable, or his accepting a bill of exchange drawn on them as partners for the very goods) will make him liable in an action for goods sold and delivered; though he will be liable in action on the bill of exchange.

Saville v. *Robertson.* 4 T. R. 720

6. *A.* and *B.*, ship-agents at different ports, enter into an agreement to share in certain proportions the profits of their respective commissions, and the discount on tradesmen's bills employed by them in repairing the ships consigned to them, &c. By this agreement they were held to become liable as partners to all persons with whom either contracted as such agent: though the agreement provided, that neither should be answerable for the acts or losses of the other, but each for his own.

Waugh v. *Carver & al.* 2 H. B. 235

7. *A.* and *B.*, general partners in trade being indebted to *C.*, for advances paid by him on the joint account of the three in the purchase of tobacco, which had been sent out on a special joint adventure to *Spain*; with a view to liquidate that balance, *C.* agreed with *A.* and *B.* to join with them in another adventure to *Lisbon*, of which he was to have one moiety; and it was agreed that *A.* and *B.* should purchase goods for the adventure, to be shipped on

board a certain vessel, and pay for them, and the returns of such adventure were to be made to *C.*, to go in liquidation of his demand on them; but *C.* was to bear his proportion of the loss, if any, and also to receive his share of the profit, if any, after reimbursing himself out of the returns the amount of his advances previously made to *A.* and *B.*: held that this agreement constituted a partnership between the three in the adventure *at* and from *the time of the purchase of the goods for the adventure* by *A.* and *B.*: although *C.* did not go with them to make the purchase, nor authorize them to purchase on the *joint* account; but *A.* and *B.* alone in fact made the purchase; and although *C.* also purchased in his own name, and paid for goods to be sent out at the same time, in which *B.* was to share the profit or loss, and these goods were consigned for sales and returns to the same person who went out as supercargo on the joint account of the three. *Gouthwaite* v. *Duckworth & Others.* 12 E. R. 421

8. One partner cannot bind the other partners by deed.
Harrison v. *Rushforth.* 7 T. R. 207

9. But he may by drawing or accepting bills of exchange. 7 T. R. 210

10. Two (of three) partners, who had contracted a debt prior to the admission of the third partner into the firm, cannot bind him without his assent by accepting a bill drawn by the creditor in their joint names: but such security is fraudulent, and void as against the third partner, and cannot be recovered in an action against the three, wherein one only of the original partners pleaded to the action.
Shirreff v. *Wilks.* 1 E. R. 48
Vide Gregson v. *Hutton, B. R. East.* 22 *G.* 3.; *and Marsh* v. *Vansommer. Guildhall, Mich.* 1786. (cited) *ib.* 49

11. If one partner draw or indorse a bill in the partnership firm, it will *primâ facie* bind the firm; although passed by the one partner to a separate creditor in discharge of his own debt: unless there be evidence of covin between such separate debtor and creditor; or at least of the want of authority either express or implied in the debtor partner to give the joint security of the firm for his separate debt. But held that no sufficient circumstance appeared in this case to raise any presumption adverse to the separate creditor taking such joint security in a case where the bill appeared to have been drawn in the name of the firm, to their own order 18 days before the delivery of it to the separate creditor and to have been accepted and indorsed before such delivery and to have been drawn for a larger amount than the particular debt: and where though the indorsement was in fact made by the hand of the debtor partner, yet it did not appear that that fact was known to the separate creditor at the time: and this too in a case where direct evidence might have been given of the covin or want of authority if it existed.
Ridley & al. v. *Taylor.* 13 E. R. 175

12. But where *A. B.* and *C.* were engaged in a cotton trade under the firm of *A.* and *B.* (*C.* not being known to the world as a partner), and *A.* and *B.* traded under the same firm as grocers, and a bill given to them in the cotton business was indorsed in the firm common to both partnerships and given in payment by *A.* and *B.* for goods received in their grocery business held, that *C.* was liable to pay the bill to the holders, though the indorsement was unknown to *C.* of whom the indorsee had no knowledge at the time of the indorsement. *Swan & al.* v. *Heale (Clk.) & al.* 7 E. R. 209

13. Where the consignee of goods (to whom the bill of lading was indorsed in blank) assigned it over as a security for acceptances given by the assignee not amounting to the value of the goods, and afterwards they became partners in the goods by an agreement between them that the profits and loss should be equally divided, but the first was to stand guarantee to the other for solidity of the factors by whom the goods were to be sold; and it appeared by the agreement that the consignor had not been paid for the goods; the assignee of the bill of lading cannot maintain trover against the consignor, if he stop the goods *in transitu* on the insolvency of the consignee; for one partner cannot recover those goods which the other could not.
Salomons v. *Nissen.* 2 T. R. 674
(And see tit. BILLS OF LADING 14.)

14. An action cannot be maintained by several partners for goods sold by one of them living in *Guernsey*, and packed by him in a particular manner for the purpose of smuggling, though the other partners who resided in *England*

knew nothing of the sale; for the act of one is in this respect the act of all; and it is a contract by subjects of this country, made in contravention of the laws: this case must be considered in the same light as if all the partners resided in *England*. *Biggs & al.* v. *Lawrence*. 3 T. R. 454

(And see *Waymell* v. *Reed*, title ASSUMPSIT II. 12.: *and Clugas* v. *Penaluna*, title SMUGGLING.)

15. One of two partners applied trust-money in the trade with the privity of the other partner; afterwards they separated, and the partnership effects were assigned over to the first, who took on him the debts; this was held to be no payment in discharge of the other partner, but both were liable to make good the trust-money.

Smith v. *Jameson*. 5 T. R. 601

16. In some respects an individual partner, or a particular partnership, consisting of two or more such persons as are partners in some larger partnership, may be considered as third persons in transactions in which the general partnership may happen to be engaged with a correspondent. *Per Eyre* C. J. *Bolton* v, *Puller & al.* 1 B. & P. 546, 7

17. A contract made by two partners to pay a certain sum of money to a third person, *equally out of their own private cash*, is a joint contract, and they must be jointly sued upon it.

Byers v. *Dobey*. 1 H. B. 236

18. Where money is owing to two partners, and after the death of one it is paid to a third person, the surviving partner may maintain an action for money had and received in his own right, and not as survivor.

Smith v. *Barrow*. 2 T. R. 476

(And see ASSUMPSIT VI. 25.)

19. If partners by deed assign all their partnership effects, &c. to trustees for the benefit of their creditors, and some of the separate creditors, of one partner do not assent to it, the assignment is fraudulent and void. *Eckhardt & al.* v. *Wilson*. 8 T. R. 140

20. On the dissolution of a partnership between *A. B.* and *C.*, a power given to *A.* to receive all debts owing to, and to pay all those owing from the late partnership, does not authorize him to *indorse a bill of exchange in the name of the partnership*, though drawn by him in that name and accepted by a debtor to the partnership, after the dissolution. The person therefore to whom he so indorses it, cannot maintain an action on it against *A. B.* and *C.* as partners.

Kilgour v. *Finlyson & al.* 1 H. B. 155

21. Neither can such indorsee maintain an action against *A. B.* and *C.* for money paid to the use of the partnership, though, in fact the money advanced by him in discounting the bill be applied by *A.* to the payment of a debt due from the partnership.

1 H. B. 155

22. If three partners (two of whom reside abroad, and one in *England*), be sued for a partnership debt, and the partner resident in *England* appear to the action, but refuse to appear for the partners resident abroad, the sheriff under a distringas against the two partners may take partnership effects, though paid for by the partner resident in *England* alone, to whom the partnership was legally indebted; and the court will not relieve him against such distress.

Morley v. *Strombom & al.* 3 B. & P. 254

23. The authority of one partner to bind another by signing bills of exchange and promissory notes in their joint names is only an implied authority, and may be rebutted by express previous notice to the party taking such security from one of them, that the other would not be liable for it. And this, though it were represented to the holder, by the partner signing such security, that the money advanced on it was raised for the purpose of being applied to the payment of partnership debts; and though the greater part of it were in fact so applied. Nor can he recover, against the other partner, the amount of the sum so applied to the payment of the partnership debts against such notice. *Gallway (Ld.)* v. *Matthew & al.* 10 E. R. 264

24. The defendant agreed in writing to take one half share of certain goods bought by the plaintiff on their joint account, half in the profit or loss, and to furnish the plaintiff with half the amount in time for the payment thereof the goods being to be paid for by bills: held, first, that this was an agreement relating to the sale of goods within the exemption in the stamp act 44 *G.* 3. *c.* 98 sched. *A.* and did not require a stamp; 2d. that the plaintiff having paid the whole price of the goods which were to constitute the partner-

ship stock, to which both parties were to contribute equally, an action lay against the defendant for his moiety of the price, which was to be furnished by him in the first instance, although there might be an account to be taken between them as partners upon the subsequent disposal of the joint stock.

Denning v. *Leckie.* 13 E. R. 7

25. An admission made by one of two partners, after the dissolution of the partner-ship, is competent evidence to charge the other partner.

Wood v. *Braddick.* 1 W. P. T. 104

26. If several persons horse, with horses their several property, the several stages of a coach, in the general profits of which they are partners, they are not all not jointly liable for goods furnished to one partner for the use of the horses drawing the coach along his part of the road.

Barton v. *Hanson & al.* 2 W. P. T. 49

27. In an action on the case upon a delivery of goods to several joint owners of a ship to be carried to *A.* for freight, alleging a deviation; if the Plaintiff fail in proving all the Defendants to be owners, he cannot recover even against those whom he proves to be owners.

Max v. *Roberts & al.* 2 N. R. 454

PATENT.

1. A patent is void if the specification be ambiguous, or give directions which tend to mislead the public.

Turner v. *Winter.* 1 T. R. 602

2. So if the patentee say that by one process he can produce three things, and he fail in any one. 1 T. R. 602

3. So if the specification direct the same thing to be produced several ways, or by several different ingredients, and any one of them fail. 1 T. R. 602

4. A patent was granted by the crown to *A.* for 14 years, for his "method of lessening the consumption of steam and fuel in fire engines;" the specification stated that "the method consisted of the following principles," (describing the mode in which those principles were applied to the purposes of the invention;) afterwards an act of parliament was passed to extend the patentee's term, the title of which was 'An act for vesting the sole property, &c. of certain steam engines called *Fire Engines* of his invention,' &c. and after reciting that the patent was "for making and vending certain engines, by him invented for lessening the consumption of steam and fuel in fire engines," &c. it granted him the sole right of "making and selling the said engines." The Court of K. B. held unanimously, that the invention was the subject of a patent; and (the patentee having in his specification described his invention, held that the patentee's right under the patent and act of parliament was valid.

Hornblower & al. v. *Boulton & al. (in error.)* 8 T. R. 95

5. This case, though it came from the Court of C. P. was not argued there, that Court having been equally divided in a former case arising on the same patent. *Eyre* C. J. and *Rooke* for the patent, and *Buller* and *Heath* J. J. against it.

Boulton & al. v. *Bull.* 2 H. B. 463-500

6. It seemed admitted, that under the proviso in stat. 21 *Jac.* 1. *c.* 3. § 6, there cannot be a patent for a philosophical *principle* only, neither organized nor capable of being so: but that a patent for a machine improved by a philosophichal principle, though the machine existed before, is good.

8 T. R. 95: 2 H. B. 463, &c.

7. One having obtained a patent for a certain manufacturing machine, of which he duly inrolled a specification, afterwards obtained another patent for certain *improvements in the said machine*, in which the grant of the former patent was recited; and the latter patent contained the usual condition that it should be void, if the patentee did not within one month inroll a specification, *particularly describing and ascertaining the nature of the said invention, and in what manner the same was to be performed:* held that a specification, containing a full description of *the whole machine* so improved, but not distinguishing the new improved parts, or referring to the former specification, otherwise than as the second patent recited the first, was a performance of that condition.

Harmar v. *Playne.* 11 E. R. 101

8. In *assumpsit*, the plaintiff on an agreement by the defendant not to avail himself, or take any undue advantage of a communication made to him by the plaintiff of an invention for which the plaintiff intended to take out a patent, and assigned as a breach, that the defendant fraudulently obtained a patent or the invention in his own name. Evidence that the defendant

fraudulently obtained a patent in his own name, which the plaintiff afterwards agreed should remain in the defendant's name upon certain terms, which terms the defendant before the commencement of the action had renounced, insisting upon the invention as his own, was held to maintain this breach.

Smith v. *Dickenson*. 3 B. & P. 630

PAYMENT OF MONEY INTO COURT.

1. If the court see reason to suspect that a *qui tam* action is prosecuted merely for the issue money, they will on motion permit it to be paid into court to abide the event of the suit.

Parker q. t. v. *Macfarlan*. 3 T. R. 132

2. The plaintiff having declared on a bond, dated in 1775, for 2,400*l.* proclamation-money of *North Carolina*, averring that it was of a certain value, the court would not permit the defendant to pay the 2,400*l.* proclamation money into court in the year 1792, when the proclamation-money had become depreciated, &c.

Cuming v. *Munro*. 5 T. R. 87

3. The Court of K. B. refused to permit a defendant ro pay money into court in an action against the sheriff for a false return to a *fi. fa.*

Bowles v. *Fuller*. 7 T. R. 335

4. The court also refused to permit the defendant to pay money into court in an action for dilapidations. *Salt* v. *Salt & al. (executors.)* 8 T. R. 47

5. The Court of C. P. permitted *the plaintiff* in replevin to pay into court the rent for which the defendant avowed.

Vernon v. *Wynne (Bart.)* 1 H. B. 24

6. In an action against a carrier who had given notice that he would not be answerable beyond 20*l.*, unless on certain conditions, the Court of K. B. permitted the carrier to pay 20*l.* into court. *Hutton & Ux.* v. *Bolton, B. R. R.* 22 *G.* 3. 1 H. B 299, *n.*

7. In assumpsit against a carrier for goods spoiled, the defendant was not allowed to pay the invoice price into court.

Fail v. *Pickford*. 2 B. & P. 234

8. In an action for breach of a contract to deliver goods at a certain price *per* ton, the court will not allow the defendant to pay money into court.

Strong v. *Simpson*. 3 B. & P. 15

9. Claims being made on a prize agent by several persons for the prize money due to a sailor, the agent was permitted as a public officer to pay the money into court for the benefit of the claimant, who should prove his authority to receive it.

Edwards v. *Minett*. 1 W. P. T. 166

10. Payment of money into court is only an acknowledgment by the defendant that the plaintiff is entitled to recover the sum so paid; but it does not preclude him from taking any objection to the legality of the contract, in order to prevent plaintiff from recovering beyond that sum; though unless such sum were paid, such objection would be a bar to the plaintiff's action.

Cox & al. v. *Parry*. 1 T. R. 464

10. The Court of C. P. held that payment of money into court is an admission of a legal demand only, if there be a legal demand in the declaration to which it may be applied, though there may be an illegal one also: and that in such case money so paid cannot be applied to an illegal account.

Ribbans v. *Cricket & al.* 1 B & P. 264

12. The Court of C. P. held that payment of money into court *on the whole declaration*, in an action on a bill of exchange, is such an admission of the validity of the bill, as to prevent the necessity of proving the drawer's handwriting. *Gutteridge* v. *Smith*. 2 H. B. 374

12. *Qu.*—Whether a defendant can demur to evidence after having paid money into court, 1 H. B. 93; or be nonsuited? See 2 H. B. 375

13. The payment of money into court upon a count stating a special contract in an admission of such contract, and narrows the inquiry to the quantum of damages sustained by the breach thereof. Therefore if the plaintiff declare as upon a general undertaking by the defendant to carry goods for hire, on which the defendant pays 5*l.* into court, the latter cannot give in evidence that the contract was that he should not be answerable for goods lost to a greater value than 5*l.* unless entered and paid for accordingly: though if no money had been paid into court, the plaintiff must have been nonsuited on such evidence. *Yate* v. *Willan*, 2 E. R. 128, and *Piggott* v. *Dunn. E.* 36 *G.* 3. cited *ib.*

15. When money is paid into court generally upon a declaration in contract,

it is an admission of the existence of a contract in every transaction which is capable of being converted into a contract by the assent of the parties.

Bennett v. *Francis.* 2 B. & P. 550

16. Therefore where a defendant who had possessed himself of goods belonging to the plaintiff, and had sold part and kept the residue in specie, paid money into court generally, upon a declaration containing a count for goods sold and delivered, it was held that he had thereby admitted the transaction to have been converted into a contract, and that the plaintiff was entitled to recover the value of all the goods under the count for goods sold and delivered. *ib.*

17. If the defendant pay money into court generally upon a declaration containing a count on a policy of insurance, together with the money counts, and it appear that the plaintiff by his conduct previous to the trial, induced the defendant to believe that the only point to be tried was a question of fraud, and suffered him to prepare his evidence accordingly, the court will not allow the plaintiff to object to the receipt of that evidence at the trial, on the ground of the contract having been admitted by payment of money into court.

Muller v. *Hartshorn.* 3 B. & P. 556

18. Where after an action commenced, and before money could regularly be paid into court, a tender was made of a sum for damages, with costs, up to that time and refused, the Court of C. P. on motion permitted that sum to be paid into court, and struck out of the declaration, and ordered all subsequent costs to be paid by the plaintiff; although the plaintiff went for other causes of action than those on which the sum was tendered.

Roberts v. *Lambert.* 2 W. P. T. 283

19. If defendant bring money into court on a plea of tender, plaintiff may take it out, though he reply that the tender was not made before action brought.

Le Grew v. *Cooke.* 1 B. & P. 333

20. Paying money into court where the demand is for unliquidated damages, by a judge's order after plea pleaded, is irregular: but if the plaintiff take the money out he thereby waves the irregularity, and cannot afterwards have a verdict unless he recover more than the usual sum paid in.

Griffiths v. *Williams.* 1 T.R. 710

21. The only case where a party shall be bound by the payment of money, though by mistake is where it is paid into court under a rule.

Malcolm v. *Fullarton.* 2 T. R. 645

22. The court will not order money paid into court by the defendant through a mistake to be restored to him.—

Vaughan v. *Barnes.* 2 B. &. P. 392

23. Though perhaps in case of fraud they would. *ib.*

24. If a defendant pay a sum of money into Court, and obtain an order to stay proceedings on payment of that sum and costs, and omit to pay the costs when taxed, the plaintiff after taking the money out of court may proceed without a previous demand of the costs.

B. Smith v. *G. Smith.* 2 N. R. 473

25. If money is paid into court upon one count of the declaration, and the plaintiff takes it out, he is not entitled to the costs of the other counts.

Skarratt v. *Vaughan.* 2 W. P. T. 266

PEER.

1. *Qu.*—Whether a peer of parliament can be sued in the King's Bench by *bill? Lonsdale (E.)* v. *Littledale (in Cam. Scac.)* 2 H. B. 267

2. But having pleaded in chief to a bill filed against him in that court, he cannot afterwards assign for error that he ought to have been sued by *original writ* and not by bill. S. C. *in the House of Lords in error.* 2 H. B. 299

3. If a peer be sued by bill, no objection can be taken to such proceeding, except by plea in abatement.

Hosier v. *Lord Arundel.* 3 B. & P. 7

4. *Qu.* Whether even in that mode, such an objection could prevail. *ib.*

5. A writ of latitat issued against a peer was superseded on motion, grounded on an office copy of the *præcipe*, in which he was stiled Baron of *W.*

Couch v. *Lord Arundel.* 3 E. R. 127

6. A Roman Catholic peer is not entitled to the privilege of franking.

Ld. Petre v. *Ld. Auckland (in error.)* 2 B. & P. 139

PENAL ACTION.

1. The exceptions in the enacting clause of a statute, which creates an offence and gives a penalty, must be negatived by the plaintiff in his declaration.
Spieres v. *Parker*. 1 T. R. 141
2. Not so where they are contained in a subsequent proviso. 1 T. R. 141
3. Nor if they are contained in a subsequent statute, in which case the defendant must shew, by way of defence, that he comes within such exceptions.
R. v. *S. Hall*. 1 T. R. 322
4. And where a prosecutor in his information negatives some of the exceptions which he need not, they may be rejected as surplusage. 1 T. R. 322
(See also CONVICTION VII. 3. 5.; & *Gill* v. *Scrivens*, STATUTE I.)
5. Where a statute gives accumulative damages to party grieved, it is still but a civil remedy.
Woodgate v. *Knatchbull*. 2 T. R. 154
6. The stat. 21 *Jac.* 1. *c.* 4. only applies to those penal statutes on which proceedings may be had before the justices of assise, justices of the peace, &c. *Leigh q. t.* v. *Kent*. 3 T. R. 362
Balls q. t. v. *Atwood*. 1 H. B. 546
7. The Court of K. B., under favourable circumstances, gave leave to compound in a penal action for usury, after verdict.
Maughan q. t. v. *Walker*. 5 T. R. 98
8. But the Court of C. P. on such an application said, it lay which the defendant to shew the circumstances which might entitle him to such indulgence.
Crowder q. t. v. *Wagstaff*. 1 B. & P. 18
9. In compounding a penal action on the post-horse act (which gives costs to the prosecutor), the prosecutor was allowed to receive the deficient duties (not amounting to 40s.) and full costs of suit, though together exceeding the 40s. paid to the crown.
North q. t. v. *Smart*. 1 B. & P. 51
10. In compounding an action on a penal statute which gives no costs the plaintiff having agreed to stay proceedings on payment of a sum, in equal moieties to the crown and the plaintiff, and the entire costs to the plaintiff, the crown obtained half the costs also.
Lee v. *Cass*. 2 W. P. T. 213
11. The Court will not grant permission to compound a penal action in which part of the penalty goes to the king, unless the consent of the crown is previously signified, whether a verdict has passed for the plaintiff or not.
Howard q. t. v. *Sowerby*. 1 W. P. T. 103
12. Money paid by *A.* to *B.*, in order to compromise a *qui tam* action of usury brought by *B.* against *A.*, on the ground of an usurious tranaction between the latter and one *E.*, may be recoved back in an action by *A.* for money had and received. For the prohibition and penalties of the stat. 18 *Eliz. c.* 5. attach only on the "informer or plaintiff, or other person suing out process in the penal action, making composition," &c. contrary to the statute; and not upon the party paying the composition; and therefore the latter does not stand, in this respect, in *pari delicto*, nor is *particeps criminis* with such compounding informer or plaintiff. *Williams* v. *Hedley*. 8 E. R. 378
13. And such recovery may be had although *E.*'s assignees had before recovered from *B.* the money so received by him as money received to their use (the money paid by way of composition being at the time stated to be *E.*'s money.); there being no evidence at the trial of this cause to shew that *A.* the plaintiff was privy to that suit. 8 E. R. 378
14 The court will not (before trial) stay proceedings in an action against a sheriff's officer for a penalty on stat. 32 *G.* 2. *c.* 28. § 12. though a similar action has been commenced against the sheriff for the same offence.
Pechell v. *Layton*. 2 T. R. 512
15. But after verdicts in both actions, the court will stay the proceedings in both on paying one penalty, and the costs in one action. 2 T. R. 712
16. A discontinuance is cured by the appearance of the party by stat 32 *Hen.* 8. *c.* 30. in penal as well as civil actions.
Humble v. *Bland (in error)*. 6 T. R. 255
17. If the jury find a verdict for the plaintiff with one penalty *generally* in a penal action, and the plaintiff apply it to one count, he cannot afterwards apply it to another, though the former be bad in law, and though the evidence would have warranted the verdict on any other count.
Halloway q. t. v. *Bennett*. 3 T. R. 448
18. It appearing that the bill in a penal action had been taken off the file, the court permitted it to be supplied from a copy taken by the plaintiff himself.
Petrie v. *Benfield*. 3 T. R. 476

19. The stat. 37 *G.* 3. *c.* 90. § 26. requiring a proctor to take out a certificate for practising under a certain penalty, gives no action to a common informer for the recovery of it; the 6th section of that act, incorporating the power of suing, &c. given by former statutes, only referring to penalties in respect of duties created by prior sections of that act.

Barnard v. *Gostling*. 2 E. R. 569

20. It seems that two proctors may be sued together for not obtaining and entering their certificates, and that one may be acquitted and the other convicted. *ib.*

21. But on error brought in the Exchequer Chamber, both points were overruled.

Barnard v. *Gostling & al.* 1 N.R. 245

22. *Qu.*—Whether it be not bad to sue under the statute for not having *obtained and entered* a certificate, without distinguishing which of those two omissions the person sued has been guilty of. *ib.*

23. A joint action may be maintained against several to recover a penalty upon the game laws.

Hardyman v. *Whitaker*, *M.* 22. *G.* 2. (cited) 2 E. R. 573, *n.*

24. The stat. 39 *G.* 3. *c.* 79. giving a penalty of 20*l.* for printing papers to be published, without adding the printer's name and place of abode, directs that any penalty imposed by the act *exceeding* 20*l.* may be sued for in the courts at *Westminster*; and any penalty not exceeding 20*l.* *shall and may be* recovered before any justice of peace: but it also gives, in the same clause, a form of declaration, *for recovering* 20*l.* in the courts of *Westminster*. Yet held that a common informer cannot sue for a penalty of 20*l.* in this court: no such power having been given by the statute, and there being no power at law for a common informer to sue for any penalty; and that the form of the declaration must be read *in blank*, as to the sum, such form being otherwise inapplicable to a larger penalty before given: and that no such action lay to recover two or more penalties of 20*l.* each.

Fleming, *q. t.* v. *Bailey*. 5 E. R. 313

25. Assuming it to be necessary in an action for a penalty by a common informer that the court should refer to the statute *giving the remedy*, as well as to that *creating the offence and giving the penalty*; yet a count for a penalty on the stat. 5 *Ann.* *c.* 14, stating that the defendant kept a snare to kill game *against the form of the statute in such case made*, &c. by reason *whereof*, and *by force of the statute* in such case made, &c., is sufficient; for the first statute mentioned refers to the 5 *Ann.* *c.* 14. creating the offence and giving the penalty; and the statute lastly mentioned refers to the 2 *Geo.* 3. *c.* 19. whereby the *whole* penalty is given to the common informer, the half only of which had been given to him by an intervening statute.

Clonricarde (E.) v. *Stokes*. 7 E.R. 516

26. Though a penal action be removed out of the proper county into another for trial, yet the cause of action must still be proved to have happened within the proper county where the venue is laid.

Robinson v. *Garthwaite*. 9 E. R. 296

PENALTY.

1. To entitle himself to a penalty on articles of agreement, the plaintiff must shew a strict performance on his part.

1 H. B. 270

2. By articles of agreement between the plaintiff and defendant, it was agreed that the plaintiff should pay the defendant so much *per* week to perform at his theatres, with her travelling expenses, and that the defendant should perform at the theatres such things as she should be required by the plaintiff, and attend at the theatres beyond the usual hours on any emergency, and at rehearsals, or be subject to such fines as are established at the theatres, and abide by the regulations of the theatres, and pay all fines; and that "either of them neglecting to perform that agreement should pay to the other 200*l.*" The court held, principally on the ground of the stipulation in the agreement for the payment of smaller sums in certain cases, namely, the fines, that the 200*l.* was in the nature of a penalty, and not of liquidated damages.

Astley v. *Weldon*. 2 B. & P. 346

3. If a party agree not to do some specified act under a "penalty" of 1000*l.* such sum cannot be considered in the nature of liquidated damages.

Smith v. *Dickenson*. 3 B. & P. 630

PERJURY.

1. To found an indictment for perjury the requisite circumstances are these: *the oath must be taken in a judicial proceeding, before a competent jurisdiction: and it must be material to the question depending, and false.*
R. v. *E. Aylett.* 1 T. R. 69

2. Perjury may be assigned on an affidavit of an attorney of the court made in answer to a charge exhibited against him in a summary way for having in his possession blank pieces of paper with affidavit stamps, and the signatures of a Master extraordinary in Chancery and another person at the bottom of the papers.
R. v. *Crossley.* 7 T. R. 315

3. It is no objection to such an indictment that it is not stated where the court was holden when the original application was made, or when the rule was made, calling on the defendant to answer the charge; a sufficient venue being laid on the act of taking the false oath. 7 T. R. 315

4. In the indictment there must be an allegation of *time* and *place*, which are sometimes material and necessary to be laid with precision, and sometimes not. 1 T. R. 69

5. Where time is not material, it need not be positively averred, and if under a *videlicet*, may be rejected.
1 T. R. 70, 1

6. It is not necessary to set forth in an indictment for perjury so much of the proceedings of the former trial as will shew the materiality of the question on which the perjury is assigned; it is sufficient to allege generally that the particular question became a material question. 5 T. R. 318

7. By stat. 23 *G.* 2. *c.* 11. the prosecutor need only set forth in the indictment the substance of the offence charged, and by what court or before whom the oath was taken (averring such court, &c. to have competent authority to administer the same), &c. without setting forth the commission or authority of the court, &c.
5 T. R. 317

8. In an indictment for a perjury committed at the admiralty session, where the commission was directed to *A.*, *B.*, and *C.*, and others not named, of whom *A.*, *B.*, and *C.*, were among others *to be one*; the court will take it to mean that, if either of the persons named of the quorum were present, it would be sufficient.
R. v. *Dowlin.* 5 T. R. 311

9. In such case it is not necessary to set out the commission in the indictment.
5 T. R. 317

10. But where the prosecutor in perjury, undertakes to set out in the indictment more of the proceedings than he need under the stat. 23 *G.* 2. *c.* 11. he must set them forth correctly. 5 T. R. 317

11. Stating that at a Court of Admiralty Session *J. K.* was *in due form of law tried upon a certain indictment then and there depending* against him for murder, and that *at and upon the said trial it then and there became and was made a material question* whether, *&c.* are sufficient averments that the perjury was committed on the trial of *J. K.* for the murder, and that the question on which the perjury was assigned was material on that trial.
5 T. R. 317

12. A complaint having been made *ore tenus* by a solicitor before the Chancellor in the Court of Chancery, of an arrest in returning home after the hearing of a cause, the indictment stated that "*at and upon the hearing of the said complaint,*" the defendant deposed, *&c.*; this is a sufficient averment that the complaint *was heard.*
1 T. R. 70

13. The complaint of the defendant being that he was taken before he got to his own house in the parish of *St. Martin in the Fields, inuendo* his house *in the Haymarket*, in *St. Martin's*, &c. The *inuendo* is only a more particular description of the same house, and good. 1 T. R. 70

14. The oath being that the defendant was arrested upon the steps of his own door, an *inuendo* that it was the *outer* door is good. 1 T. R. 70

15. An indictment for perjury assigned on an affidavit sworn before the court of *B. R.* need not state, nor is it necessary to prove, that the affidavit was filed of record, or exhibited to the court, or in any manner used by the party. 7 T. R. 315

16. The punishments directed by the statute 18 *G.* 2. *c.* 18. to be inflicted upon perjury in falsely taking the freeholder's oath at an election of a knight of the shire, are *cumulative* under the stat. 5 *Eliz. c* 9. § 6. and 2 *G.* 2. *c.* 25. § 2. to which the first-mentioned statute refers. *R.* v. *Price.* 6 E. R. 327

17. If one party to a civil suit be convicted of perjury upon the testimony of another, the witness cannot in any manner avail himself of that conviction in the same suit.
Burdon v. *Browning*. 1 W. P. T. 520

PEW.

1. A person may prescribe for a pew in the chancel of a church.
Griffiths v. *Matthews*. 5 T. R. 297
2. There cannot be a gift of pew to a man without a faculty.
Rogers v. *Brooks*. 1 T. R. 431; *n.*
3. *Possession* alone of a pew in a church, though for above sixty years, is not a sufficient title to maintain an action on the case, even against a wrong-doer, for disturbance in the enjoyment of it; but the plaintiff must prove a prescriptive right, or a faculty, and should claim it in his declaration, *as appurtenant to a messuage in the parish*. *Stocks* v. *Booth*. 1 T. R. 428
4. But possession for 56 years, where the pew is claimed *as appurtenant to a messuage*, is a good presumptive evidence of a faculty.
Rogers v. *Brooks & Ux. M.* 24. *G.* 3. *B. R.* 1 T. R. 431, *n.*
5. So uninterrupted possession of a pew in the chancel for 30 years, unexplained, is presumptive evidence of a prescriptive right to the pew in an action against a wrong-doer. 5 T. R. 297
6. But that presumption may be rebutted by proof that prior to that time the pew had no existence. 5 T. R. 297
7. A faculty to a man *and his heirs* is bad.
Stocks v. *Booth*. 1 T. R. 432
8. If a faculty be annexed to a messuage, it may be transferred with the messuage to another person. 1 T. R. 431
9. There may be a faculty for exchanging seats in a church. 1 T. R. 431
10. Trespass will not lie for entering into a pew; because the plaintiff has not the exclusive possession, the possession of the church being in the parson. 1 T. R. 430

PHYSICIAN.

1. A physician cannot maintain an action for his fees.
Chorley v. *Bolcot*. 4 T. R. 317
2. A doctor of physic, who has been licensed by the college of physicians to practise physic in *London* and within seven miles, cannot claim, as a matter of right, to be examined by the college in order to his being admitted a fellow of the college. *R. The President and College of Physicians*. 7 T. R. 282
3. The college of physicians, who have power by their charter (confirmed by act of parliament) to make bye-laws, have made bye-laws respecting the qualifications of persons to be admitted into the college; by them it is ordained that no person shall be admitted into the class of candidates before admission into the college, unless he has taken a degree of *M.D.* at *Oxford*, *Cambridge*, or *Dublin*, except in two cases; in one of those cases, the president may propose once in every other year a doctor of physic of a certain standing, and if he be approved by the college, he may be admitted a fellow; in the other, any fellow may propose a doctor of physic of a certain age and standing, and if approved at certain meetings he may be admitted a fellow: held that these were reasonable bye-laws. 7 T. R. 282

PLEADING.

1. *Bankruptcy.*

1. A plea of bankruptcy given by stat. 5 *G.* 2. *c.* 30 § 7. must state that the *cause of action* accrued before the bankruptcy; stating that an *indenture*, on which an action of covenant is brought *was executed* prior to the bankruptcy is not sufficient.
Charlton v. *King*. 4 T. R. 156
2. The general plea of bankruptcy, and the certificate given by stat. 5 *G.* 2. *c.* 30. § 7. may be pleaded, without averring that the bankruptcy happened *before* the commencement of the suit. But if it appeared at *nisi prius* that it happened *after* the action brought, it seems that the defendant cannot avail himself of the defence under such a general plea, which is only given by the statute in case any bankrupt who has conformed to the law shall afterwards be arrested or impleaded for any debt due before such time as he became bankrupt.
Tower v. *Cameron*. 6 E. R. 413
3. In K. B. a plea of bankruptcy need not be signed by counsel.
Leigh q. t. v. *Monteiro*. 6 T. R. 496
4. But in C. P. it must.
Pitcher v. *Martin*. 3 B. & P. 171
5. The certificate of a bankrupt, allowed after the filing of the plaintiff's bill and before plea pleaded, is evidence to support the general plea in bar given by the stat. 5 *G.* 2. *c.* 30. § 7. viz. that before the exhibiting of the plaintiff's bill the defendant became a bankrupt, and that

the cause of action accrued before he became a bankrupt.

Harris v. *James.* 9 E. R. 82

6. A declaration in a *scire facias* by the assignees of a bankrupt, stating, "that he became a bankrupt within the meaning of the statutes, &c. and that his goods and effects were afterwards in due manner assigned to the plaintiffs," is sufficiently certain, without alleging that the party was declared a bankrupt, or that his effects were assigned by deed.

Winter v. *Kretchman.* 2 T. R. 45

7. A general plea of bankruptcy in *Ireland*, referring to an *Irish* act of parliament, and concluding to the country (in a mode similar to that given by stat. 5 *G.* 2. *c.* 30. § 7. to bankrupts in *England*), is bad. 2 H. B. 553

8. The Court of C. P. set aside a regular judgment on an affidavit of merits, though the defendant intended to plead his bankruptcy. *Evans* v. *Gill.* 1 B. & P. 52

9. It is a good plea to an action on a promissory note, and for money had, that the plaintiff is an uncertificated bankrupt, and that his assignees required the defendant to pay to them the money claimed by the plaintiff, and it is no good replication that the cause of action accrued after the plaintiff became bankrupt, and that the commissioners had not made any new assignment of the note and money: for the assignment of the creditors, passes to the bankrupt's assignees all his after-acquired as well as present personal property and debts.

Kitchen v. *Bartsch.* 7 E. R. 53

10. A bankrupt sued by his surety, or person who was liable for his debt, at the time of the commission issued against him (though the surety, &c. became such after the act of bankruptcy, and paid the debt after the issuing of the commission), cannot, without specially pleading it, *in like manner* as after the stat, 5 *G.* 2. *c.* 39. § 17. avail himself of his certificate under the stat. 49 *G.* 3. *c.* 121. § 8. which *discharges* the bankrupt, having his certificate, of all such *demands*, at the suit of every such person, *in like manner to all intents and purposes* as if such person had been a creditor before the bankruptcy.

Stedman v. *Martinnant.* 12 E. R. 664

II. *Declaration.*

1. Where the same plea may be pleaded and the same judgment given on two counts, they may be joined in the same declaration. *Brown* v. *Dixon.* 1 T. R. 274

2. A count in covenant, charging the defendants as executors for breaches of covenant by their testator as lessee, who had covenanted for himself, his executors, and assigns, may be joined with another count, charging them that after the testator's death, and their proving the will, and during the term, the devised premises came by assignment to one *D. A.*, against whom breaches were alleged; and concluding that so neither the testator, nor the defendants after his death, nor *D. A.* since the assignment to him, had kept the said covenant, but had broken the same. And *plene administraverunt* may be pleaded to both counts.

Wilson v. *Wigg.* 10 E. R. 313

3. *Assumpsit* and *trover* cannot be joined. 1 T. R. 277

4. But to a declaration against a common carrier, upon the custom of the realm, a count in trover may be added. 1 T. R. 277

5. In debt for goods sold and delivered the plaintiff declared that the defendant *at Westminster in the county of Middlesex was indebted* to him in a certain sum for goods sold and delivered without alleging an express contract and place were such contract was made; upon special demurrer for these causes, the court held the contract and venue well laid. *Emery* v. *Fell.* 2 T. R. 28

6. A declaration stated that in consideration that the plaintiff had sold to the defendant *a certain horse* of the plaintiff at and for a *certain quantity of certain oil*, to be delivered within a *certain time*, which had elapsed before the commencement of the suit, the defendant promised to deliver the said oil accordingly; held well enough after verdict. *Ward* v. *Harris.* 2 B. & P. 265

7. A count in an action on the case stated, that whereas heretofore, &c. the plaintiffs had agreed to purchase and the defendants to sell and deliver to them *at a certain rate or price per pound, to be paid in a manner then stipulated between them*, 40 bags of wool, *to be delivered* by the defendants to the plaintiffs *at a time which before the making of the promise of the defendants after mentioned had elapsed*, but which wool had not been delivered: and thereupon *in consideration of the premises* and *also in consideration* that

the plaintiffs would still receive and pay for the said wool, *at the rate or price and in the manner last aforesaid* on the delivery of it within a reasonable time: *the defendants promised the plaintiffs* to deliver the said wool accordingly within such reasonable time as aforesaid: and then alleged, that though the plaintiffs, for a reasonable time after the defendant's promise, were ready and willing to receive and pay for the wool *at the rate and price and in manner last aforesaid*, yet the defendants would not deliver, &c. Held that this was too general and bad upon special demurrer, inasmuch *as no price and manner of payment* were mentioned, which was referred to in, and incorporated with, and made part of the consideration of the new promise declared on: and without such price being stated no measure was given to the jury for estimating the damage to the plaintiffs by the non-delivery of the goods. *Andrews & al.* v. *Whitehead & al.* 13 E. R. 102

8. Declaration that "in consideration that the plaintiff had taken the defendant's goods on board his ship to be carried to *A.*, the defendant promised to pay the money due for freight and carriage of the same on the delivery of the bill of lading; that the bill of lading was delivered, by reason whereof the defendant became liable to pay a large sum, to wit, 20*l.* for freight and carriage of the said goods:" held bad on demurrer, because it did not appear that any thing became due for freight on the delivery of the bill of lading. *Blakey* v. *Dixon.* 2 B. & P. 321

9. *Qu.*—Whether in alleging the promise to pay in the above case, the plaintiff should not have stated the specific sum, or have said, so much as should be reasonably due? *ib.*

10. *A.* having recovered judgment against *B.*, and a *fi. fa.* being delivered to the sheriff, in consideration that *A.* at the special instance and request of *C. had requested the sheriff not to execute the writ, C.* promised to pay *A.* the debt and costs, together with the sheriff's poundage, bailiff's fees, and other charges. On a judgment by default and error brought, the promise was holden to be binding on *C.*, though it was not averred that the sheriff did in fact desist from the execution, nor what the amount of the poundage, &c. was, nor that the defendant had notice of said account. *Pullen* v. *Stokes (in Cam. Scac.)* 2 H. B. 312

11. The first count of a declaration in *assumpsit* stating an agreement between two persons, omitted the mutual promises. On motion in arrest of judgment, held that the agreement imported a promise.

Mountford v. *Horton.* 2 N. R. 62

12. Defendant agreed to pay to plaintiff within two months 1,500*l.* and in consideration thereof plaintiff agreed to deliver up all securities in his possession under which he claimed any debt against the estate of *J. W.*, deceased, to execute a general release of all claims on the estate of *J. W.* for matters between plaintiff and *J. W.* to the day of his decease, and between the trustees and representative of *J. W.* to the date of the agreement, except 600*l.* and interest due on a bond given by *J. W.* which defendant agreed to pay to the person entitled thereto. In *assumpsit*, stating mutual promises to perform the agreement, plaintiff averred that he was ready and willing to deliver up all securities under which he claimed any debt against the estate of *J. W.* deceased, and to execute a general release of all claims on the estate of *J. W.* for matters between the plaintiff and *J. W.* deceased, to the day of his decease, and assigned for breach non-payment of the 1500*l.* and 600*l.* or either of them: held that the release described in the declaration was not co-extensive with that agreed to be given, and that this defect could not be cured by a verdict. But as in this case it appeared that the payment of the money was intended to precede the release, therefore the averment was not held necessary, and the declaration well enough.

Smith v. *Woodhouse, in Err.* 2 N. R. 233

13. The omission of "and thereupon the said *J. S.* complains," in the beginning of a declaration in trespass on the case is no cause of special demurrer.

Dobson v. *Herne.* 1 B. & P. 366

14. The defendant being sued by the name of "*Jonathan otherwise John Soans*" is no cause of demurrer to the declaration; for, *non constat*, that it is not all one *christian* name.

Scott v. *Soans.* 3 E. R. 111

15. In declaring against *A.* upon a joint contract by *A.* and *B.*, it is not enough

to allege that *B.* was *in due manner outlawed;* without adding that he was outlawed *in that suit.*

Saunderson v. *Hudson.* 3 E. R. 144

16. An averment in the declaration that a co-defendant *was by due course of law outlawed, at the suit of the plaintiff in this plea and suit,* is sufficient without a *prout patet per recordum,* for the very record before the court verified that averment; and outlawries *in the same suit* need never be pleaded with a *prout patet. Macmichael* v. *Johnson.* 7 E. R. 50

17. In *assumpsit* brought by an administrator *de bonis non,* the promise may be laid to have been made to the first administrator.

Hirst v. *Smith.* 7 T. R. 182

18. If a declaration against baron and femme, for a debt of the femme contracted before marriage, allege a promise of the femme made before the marriage to pay the debt, it is bad.

Norris & Ux. v. *Norfolk & al.* 1 W. P. T. 212

19. It is not necessary in a declaration on a bill of exchange to aver that the maker *delivered* it; it is sufficient to state that he made it.

Churchill v. *Gardner.* 7 T. R. 596

20. *A.* having covenanted to make a good title to *B.* at his expense, *quære,* whether it be a good averment, that *A.* was *capable, ready,* and *willing,* to make a good title, if *B.* would have prepared the conveyances. 1 H. B. 270

21. *Qu.*—Also whether a breach be well assigned, stating that *B.* did not nor would accept the title; whether it ought not to be shewn, that *A. tendered a good title* to him, which he refused? 1 H. B. 270

(See COVENANT III.)

22. In assumpsit by the vendor against the vendee of land for not accepting it and paying the purchase-money, the plaintiff averred that he was *seised in fee* of the land, and that the defendant agreed to purchase it *on having a good title,* and that his title to the land *was made good, perfect, and satisfactory to the defendant,* and that he, the plaintiff, had been always *ready and willing,* and *offered to convey the lands to the defendant* but that the defendant did not pay the purchase-money; and, on demurrer held that such general allegation of title in the plaintiff, and that his title was made *good and satisfactory* to the defendant, and that the plaintiff was ready and willing, and offered to convey to the defendant, were tantamount to performance of the agreement on his part so as to entitle him to recover for a breach of the defendant's part in not paying the purchase-money.

Martin v. *Smith.* 6 E. R. 555

23. *A.* declared in covenant against *B.* and her husband, for that *B.*, before her intermarriage covenanted with *A.* by deed to leave certain accounts in difference between them to arbitration, and to *abide* and perform the award, provided it were made during their lives. And *A.*, protesting that *B.* had not, before her intermarriage, performed her part of the covenant, averred that *after* making the indenture and *the intermarriage of the defendants,* the arbitrator *awarded B.* to pay *A.* a certain sum; and then alleged a breach for non-payment of such sum. After verdict, on *non est factum* pleaded; held, that upon this declaration it must be taken that *B. intermarried after* the submission and *before* the *award* made; in which case, although the plaintiff could not recover on the breach assigned *for non-payment of the sum awarded,* because the *marriage* was a *countermand* to the *authority of the arbitrator:* yet, as by the marriage itself *B.* had, by her own act, put it out of her power to perform the award, the covenant to *abide* the award was broken; and therefore judgment could not be arrested on the ground that the marriage was a revocation of the arbitrator's authority, and that so the plaintiff could not recover *as for a breach by non-performance of the award.*—*Charnley* v. *Winstanley & Ux.* 1 E. R. 266

24. On a motion in arrest of judgment the Court of K. B. held, that if one of several part-owners of a chattel sue alone for a tort the defendant can only take advantage of the objection by a plea in abatement, even though the defect appear on the declaration.—

Addison v. *Overend.* 6 T. R. 766

(And see title ABATEMENT IV. 8.)

25. The reversion of lands, demised to the defendant for years, is conveyed to *A.* and *B.*, and the heirs of *B.* in trust for *A.* and his heirs: *A.* declares singly on a covenant contained in the lease, and after setting out the above title, without averring the death of *B.* states himself to be "thereby seized of the reversion in his demesne as of fee." Upon general demurrer, to the declaration, the Court of C. P. held

this to be bad, and that the defendant need not plead it in abatement.

Scott v. *Godwin.* 1 B. & P. 67

26. Declaration on a policy on ship and goods at and from *London* to *Amsterdam*, "beginning the adventure on the goods from the loading thereof on board the said ship;" with a memorandum that the insurance was on 15 hogsheads of tobacco, marked B. No. 51 and 65.: special demurrer, first because the goods were not averred to have been put on board at *London*; secondly, because they were not alleged to have been marked or numbered as in the memorandum but only thus, "15 hogsheads the goods in the said policy mentioned;" thirdly, because the plaintiff was stated to have been interested until and at the time of the loss, without shewing that he was interested at the time of the policy being made; fourthly, because the allegation of the loss was without a venue *Semb.* that the declaration was bad.

De Symonds v. *Shedden.* 2 B. & P. 153

27. Policy on indigo and bale goods; the declaration alleged that "divers goods, &c. of 3,000*l.* value were put on board," and afterwards averred that "the said writing or policy of assurance was made on the said goods," &c. Held good on special demurrer.

De Symons v. *Johnston.* 2 N. R. 77

28. In a declaration for slander the plaintiff stated that he was a jobber or dealer in the funds, and as such jobber or dealer had been accustomed lawfully to contract, and had from time to time lawfully contracted, &c. that the defendant said of him as such jobber or dealer, "he is a lame duck," meaning that he had not fulfilled his contracts in respect of the said stocks or funds, in consequence of which divers persons refused to fulfil their contracts with him (specifying the contracts,) and he was prevented from fulfilling his contracts with other persons; held that it did not sufficiently appear either that the words were spoken of lawful contracts or that the plaintiff was a lawful jobber or dealer in the funds; and that the declaration was therefore bad.

Morris v. *Langdale.* 2 B. & P. 284

29. *Qu.* Whether, under such circumstances it can be stated as special damage, that divers persons refused to fulfil their contracts with the plaintiff, since he might recover a compensation by action if the contracts were lawful? *ib.*

30. In slander the plaintiff averred that he had in due manner put in his answer on oath to a bill filed against him in the Court of Exchequer by the defendant, (but did not proceed to aver any colloquium respecting that answer, with reference to which the words were spoken); and then alleged that the defendant said of him, that he was *forsworn*, *inuendo*, that the plaintiff had *perjured* himself in what he had sworn *in his aforesaid answer to the bill so filed against him:* held that that this *innuendo* could not, without the aid of such a colloquium, enlarge the sense of the words, by referring them to the answer averred in the prefatory part of the declaration to have been put in.

Hawkes v. *Hawkes.* 8 E. R. 427

31. The first count of a declaration stated that the defendant heretofore, to wit, on such a day, drew a bill of exchange bearing date the day and year aforesaid, payable two months after date. The second count stated that afterwards, to wit, on the day and year aforesaid, the defendant drew a certain other bill of exchange, payable two months after date; without mentioning any express date in either count. Held that both counts were good.

Hague v. *French.* 3 B. & P. 173

32. If a declaration alleges a bill to be accepted payable at the house of certain persons at a particular place, it must also aver that the bill was presented for payment at that place, and not to those persons generally.

Ambrose v. *Hopwood.* 2 W. P. T. 61

33. In an action against the sheriff for an escape on mesne process, it is sufficient to aver that the sheriff had not the body at the return of the writ, without negativing the appearance of the party, or his putting in bail.

Stovin v. *Perrin.* B. & P. 561

34. If the writ issue from *C. B.* and the declaration for an escape aver that the defendant had not the body "before our said Lord the King" on the return day, it is bad on special demurrer. *id. ib.*

35. Trespass for assault and false imprisonment may be laid *diversus diebus et vicibus*. *Burgess* v. *Freelove.* 2 B. & P. 425

36. But a declaration charging that the defendant on such a day, and on divers other days and times, &c. made an assault on the plaintiff, was held

bad on special demurrer; as *one assault* cannot be laid on different days.

English v. *Purser.* 6 E. R. 595

37. Declaration against the defendant for driving his cart against the plaintiff's horse with force and violence, alleging it to have been done "by and through the mere negligence, inattention, and want of proper care," of the defendant. On demurrer to this declaration as not being in trespass, held that this declaration in case was good.

Rogers v. *Imbleton.* 2 N. R. 117

38. If a contract of freight and demurrage be entered into by deed, the plaintiff cannot declare in debt generally, and give the deed in evidence; but ought to declare upon the deed.

Atty v. *Parish.* N. R. 104

39. In an action on the case in tort for a breach of a warranty of goods, the *scienter* need not be charged, nor, if charged, need it be proved.

Williamson v. *Allison.* 2 E. R. 446

40. It is not necessary to give a local description to the nuisance in an action on the case for diverting the water of a navigation; and therefore if it be doubtful whether the place where such navigation is stated to lie, be laid in the declaration as a venue or a local description, it will be referred merely to venue, and need not be proved to be at such place; but it is sufficient if it be at any other place within the county. *Mersey & Irwell Navigation* v. *Douglas.* 2 E. R. 497

41. If in an action on the case for a nuisance in erecting a weir, it be described in the declaration to be at *H.* and be proved to be at a lower part of the same water called *T.*, the variance is fatal. *Shaw* v. *Wingley, York Sum. Ass.* 1790, *cor. Wilson* J. *(cited) ib.* 500

42. Where one declared in case for obstructing a water-course, upon his *possession* of a mill *with the appurtenances* and that *by reason of such his possession he had a right to the use of water running in a certain tunnel to the mill*; such allegation is not supported by proof that the tunnel was made on the defendant's land, which he had agreed to let the plaintiff have for this purpose for a certain consideration, but of which *no conveyance* was made by the defendant to the plaintiff; and he had since refused assent: because the plaintiff had not the water *by reason of the possession* of the mill, &c. but by parol licence or contract, which could not pass the title to the land, and as a licence was revocable, and revoked.

Fentiman v. *Smith.* 4 E. R. 107

43. A declaration, entitled generally of the term, relates to the first day of the term; and the promises and breach being laid on the first day of the term, may be presumed to have been made before the delivery of the declaration; because by a reference to the ancient practice of declaring *ore tenus*, the declaration cannot be supposed to have been delivered till the sitting of the court on that day.

Pugh v. *Robinson.* 1 T. R. 116

44. Leave given to amend the declaration by entitling it of the day on which it was actually delivered, instead of the term generally, in order to accord with an averment therein, that other defendants named in the writ were then outlawed.

Coutanche v. *Le Ruez.* 1 E. R. 133

45. A declaration must be entitled of the term when the writ is returnable, though in certain cases according to the practice of the court it need not actually be filed till the next term; so that in these latter cases the plaintiff cannot recover any demand arising after the term when the writ is returnable, though before the declaration is actually filed.

Smith v. *Muller.* 3 T. R. 624

46. Upon breach of a contract for the purchase of 100 bags of wheat, 40 or 50 of which were to be delivered on one market day, and the remainder on the next market day, the plaintiff cannot declare as upon an absolute contract for the delivery of the 40 bags on the first day, &c. though forty bags were then in fact delivered: but the contract must be stated in the alternative, according to the original terms of it. *Penny* v. *Porter.* 2 E. R. 2

47. The same where the contract was to deliver goods within 14 days *or* as soon as a certain vessel arrived. *Shipham* v. *Saunders, E.* 1783. *(cited.)* *ib.*

48. In an action against a tenant upon promises that he would occupy the farm *in a good and husbandlike manner according to the custom of the country*; an allegation, that he had treated the estate contrary to *good husbandry and the custom of the country*, is proved by shewing that he had treated it contrary to the *prevalent course of good husbandry in that neighbourhood*; as by tilling *half* his farm at once, when no

other farmer tilled more than a *third*; though many tilled only a *fourth*. And it is not necessary to shew any precise definite custom or usage in respect to the quantity tilled.

Legh v. *Hewett*. 4 E. R. 154

49. The plaintiff, having declared upon an agreement to deliver soil or breeze, with a count for money had and received, proved that the defendant having agreed to deliver soil, he, the plaintiff, paid 2*l*. 5*s*. for earnest, but that the defendant refused to deliver the soil: held, that he could not recover damages for the non-delivery on the first count, on account of the variance; nor the 2*l*. 5*s*. upon the second, because the agreement was still in force.

Cooke v. *Munstone*. 1 N. R. 351

50. In declaring upon a contract, not under seal, consisting of several distinct parts and collateral provisions, it is sufficient to state so much of it as contains the entire consideration for the act, and the entire act or duty which is to be done (including the time, manner, and other circumstances of its performance,) in virtue of such consideration, the breach of which act or duty is complained of; but such part of the contract, which respects only the liquidation of damages after a right to them has accrued by a breach of the contract, is not necessary to be set forth in the declaration, but is only matter of evidence to be given to the jury in reduction of damages. Therefore assumpsit may be maintained in the common form of declaring against a carrier for the loss of goods, which were of above 5*l*. value, and were not in fact paid for accordingly, although it were part of the contract proved by general notice fixed up in the carrier's office, and presumed to be known and assented to by the plaintiff, that the carrier *would not be accountable for more than* 5*l*. *for goods, unless entered as such, and paid for accordingly.*

Clarke v. *Gray*. 6 E. R. 564

51. An averment that the defendant was indebted on a bill of exchange, and that the plaintiff having lost the bill had at his request given him a bond acknowledging payment, and conditioned to indemnify him against the bill, states a good consideration for a promise by the defendant to pay the contents of the bill.

Williamson v. *Clements*. 1 W. P. T. 523

52. In debt, by bill, the declaration is good, though the sums demanded in the several counts amount altogether to more than the sum at first demanded in the *queritur*; for that is superfluous and may be rejected.

Lord v. *Houstoun*. 11 E. R. 62

53. Where a plaintiff in *scire facias* demanded execution for a certain sum recovered by judgment of *B. R.* for damages and costs, with a *prout patet per recordum*, and also a certain other sum adjudged to him in the Exchequer Chamber for his damages and costs of a writ of error, *without a prout patet*, &c.: held that the demand being divisible, and no objection lying to the sum first demanded, a demurrer to the *whole* declaration was bad, and the plaintiff was entitled to *judgment generally* on such demurrer; the objection to the latter sum demanded being merely formal, and not available but on special demurrer.

Powdick v. *Lyon*. 11 E. R. 565

54. The offence prohibited by 3 *G*. 3. *c*. 15. § 1., is the voting as a freeman, not having been 12 months admitted, *and not having any other right of voting than that which the character of a freeman confers*. And the offence must be so averred in the declaration.

Doman v. *Marrett*. 1 W. P. T. 128

III. *Departure, and Discontinuance.*

1. Replevin for taking the plaintiff's goods and chattels, to wit, a lime kiln; avowry for rent; plea in bar that the lime kiln was affixed to the freehold: the court held the plea in bar bad, because it was a departure from the declaration, which had treated the lime-kiln as a chattel.

Niblet v. *Smith*. 4 T. R. 504

2. To debt on an annuity-bond the defendant pleaded no such memorial as the statute requires, to which plaintiff replied that there was a memorial which contained the names of the parties, &c. and the consideration for which the annuity was granted; the defendant rejoined that the consideration was untruly alleged in the memorial to have been paid to both obligors, for that one of them did not receive any part of it: the rejoinder was held bad; first, because it was a departure from the plea: secondly, because the fact alleged respecting the memorial did not contradict the replication, for the consideration might have been paid to the other obligor

on account of himself and the co-obligor, or to a stranger for them both *Praed* v. *The Duchess of Cumberland.* 4 T. R. 585

Affirmed in *Cam. Scac.* 2 H. B. 280

3. If the lord of a manor set up a custom to have the best live or dead chattel as an heriot; *qu.* if the tenant can modify that custom by pleading another that the homage shall assess a compensation in lieu of the heriot? 1 B. & P. 282

4. Debt on bond, which was conditioned to perform an award; plea, no award; replication, setting out an award; rejoinder, stating the whole award (in which were recited the bonds of submission, whereby it appeared that the award was not warranted by the submission); and then demurring. Held that the rejoinder was not inconsistent with, nor a departure from, the plea. *Fisher* v. *Pimbley.* 11 E. R. 188

IV. *Double Plea; Duplicity in Pleading.*

1. The stat. 4 *Ann.* c. 16., which allows double pleading, does not extend to penal actions. *Heyrick* v. *Foster.* 4 T. R. 701

2. To assumpsit on a bill of exchange the Court of C. P. will not allow a defendant to plead the general issue; and that the bill was given on a stock-jobbing transaction, contrary to 7 *G* 2. *c.* 8. *Shaw* v. *Everett.* 1 B. & P. 222

3. But to debt on bond they will permit the defendant to plead *non est factum;* and usury. *Lechmere* v. *Rice.* 2 B. & P. 12

4. That court only continues to exercise an authority over applications for pleading several matters (which had originally been the practice of K. B. also) in order to prevent an oppressive use being made of the liberty given by the statute. *ib.*

5. They will not allow non assumpsit; and alien enemy, to be pleaded together. *Thyatt* v. *Young.* 2 B & P. 72

6. To trespass and false imprisonment, a plea of alien enemy not allowed by K. B. to be pleaded, together with a special justification inconsistent therewith, and the general issue. *Truckenbrodt* v. *Payne.* 12 E. R. 206

7. A plea of tender to one count and a plea of alien enemy to another cannot be pleaded together. *Shombeck* v. *Dela Cour.* 10 E. R. 326

8. To debt on an escape, defendant pleaded a negligent escape, and voluntary return, since which the prisoner had been safely kept; plaintiff in his replication admitted the negligent escape and voluntary return, but alleged that the prisoner had not been safely kept since that time, having again escaped, which was a different escape from that mentioned in the plea, and the same for which the action was brought; defendant in his rejoinder traversed the allegation that the prisoner had not been safely kept, and then pleaded to the latter part of the replication as to a new assignment, a negligent escape, a voluntary return, and safe keeping since, in the same manner as in the plea. This latter part of the rejoinder the court refused to strike out on motion, but held it bad on special demurrer. *Griffin* v. *Eyles.* 1 B. & P. 413

9. The stat. 32 *G.* 3. *c.* 58 § 1., enabling defendants in *quo warranto* to plead double, is, as well as the stat. 9 *Ann.* *c.* 20, confined to *corporate* officers. *R.* v. *Richardson.* 9 E R 469

10. In an action on a bond given in the *East Indies*, where the subscribing witness resided, the defendant (after great delays caused by him), under leave to plead several matters, pleaded *non est factum*, *solvit ad diem*, and *solvit post diem:* The court, adverting to former delays of the defendant and to the probable delay by sending to the *East Indies* for the deposition of the subscribing witness, and on affidavit that part payment had been made on the bond, recently before the action, rescinded the rule for pleading double, in order to make the defendant elect to stand either on the plea of *non est factum*, or on the other pleas. *Rama Chitty* v. *Hume.* 13 E. R. 255

V. *Heir, Pleas by.*

1. A plea by an heir at law who was sued by an obligee of his ancestor, that he claimed to retain a certain sum for money laid out in repairing the premises, cannot be supported. *Shettleworth* v. *Neville.* 1 T. R. 454

2. *Qu.* Whether necessary repairs might be so pleaded? 1 T. R. 457

VI. *Not Guilty.*

1. Whether *not guilty* may be pleaded to an action of debt on a penal statute? *Coppin q. t.* v. *Carter.* 1 T. R. 462

2. Upon a *devastavit* against executors, not, guilty may be pleaded as well as *nil debet*. 1 T. R. 462
3. A defendant in an indictment for a misdemeanor cannot plead over to the charge, after a plea in abatement for a misnomer, on which issue is taken and found against him.
R. v. *Gibson.* 8 E. R. 107

VII. *Plea in bar.*

1. To *assumpsit* by several partners the defendant may plead in bar the bankruptcy of one of them.
Eckhardt & al. v. *Wilson.* 3 T. R. 140
2. Assumpsit by several as executors; plea in bar, that the promises were made by the defendant jointly with one of the plaintiffs; and held good on demurrer. *Moffatt & al.* v. *Van Millingen. B. R. E.* 27 *Geo.* 3.
2 B. & P. 124. *n*
3. *A.* made a promissory note payable to himself and *B.* and *C.* his partners; it was by them indorsed to *C.* (one of the payees) & *D.* & *E.*, also partners; In assumpsit upon the note by *C. D.*, and *E.*, against *B.*, he pleaded in bar that the promises were made by him jointly with *C.*, one of the plaintiffs; and held good on special demurrer.
Mainwaring v. *Newman.* 2 B. & P. 120
4. It is no bar to an action of *assumpsit* that there was a former action of *assumpsit* between the same parties, in which the plaintiff recovered one demand, and might also have recovered the present demand; if in point of fact the present demand were not the subject of inquiry in the former action.
Seddon v. *Tutop.* 6 T. R. 607
5. *Aliter*, if the present demand were inquired into in the former action. *ib.*
6. A *supersedeas* obtained after judgment cannot be pleaded in bar to an action on such judgment.
Topping v. *Ryan*, 1 T. R. 273
7. *A.* having privilege of parliament, owes *B.* a sum of money, for which *B.* sues him; in consequence of which *C.* enters into a bond together with *A.*, conditioned for the payment to *B.* of such sum as *B.* shall recover in the action against *A.*, in pursuance of the stat. 4 *G.* 3. *c.* 33. In that action *B.* obtains judgment, and puts the bond in suit against *C.* To the action on the bond, *C.* (though under terms by a judge's order to *plead issuably*) may plead in bar that a writ of error is depending on the judgment against *A.*
Curling v. *Innes.* 2 H. B. 372
8. *A.* gave *B.* a bond to secure an annuity, and before any payment became due *A.* lent *B.* a sum of money; on which it was agreed that *B.* should retain the payments of the annuity as they became due till that sum was discharged: then *B.* became a bankrupt; and the agreement to retain was held a good plea to an action on the bond by *B.*'s assignees for the payments accruing after the bankruptcy, being equivalent to a plea of *solvit ad diem.*
Sturdy v. *Arnaud.* 3 T. R. 599
9. If the obligor of a bond after notice of its being assigned take a release from the obligee and plead it to an action brought by the assignee in the name of the obligee, the court will set the plea aside, nor will they, under these circumstances, allow the obligor to plead payment of the bond.
Legh v. *Legh.* 1 B. & P. 447
10. *Non damnificatus* cannot be pleaded to debt on bond conditioned for the payment of a sum of money at a certain day, though it appear by the condition that the bond was given by way of indemnity.
Holmes & al. v. *Rhodes.* 1 B. & P. 638
11. A plea that the plaintiff and defendant agreed to settle all matters in dispute, and to bind themselves in a penalty not to sue each other, is a bad plea, as it does not amount to satisfaction. *James* v. *David.* 5 T. R. 141
12. To an action on a covenant in a deed (made for the performance of several matters) the defendant cannot plead that in the deed there is a covenant, that in case any difference should arise between the parties respecting any part of the agreement, it should be settled by arbitrators, and that he offered to refer the matter in dispute, but that the plaintiff refused, *&c.*
Thompson & al. v. *Charnock.* 8 T. R. 139
(And see AWARD I. 2.)
13. Performance of a covenant pleaded otherwise than in the terms of the covenant itself is bad, even on general demurrer. 1 B. & P. 458
14. If the plaintiff in covenant assigns as a breach that the defendant did not repair, a plea that the defendant did not break his covenant is bad, on special demurrer, although the declaration

concludes by averring that so the defendant hath broken his covenant; but it would be good after verdict.

Taylor v. *Needham* 2 W. P. T. 278

15. If an estate be created by deed poll, *ne lessa, ne granta, ne chargea, ne enfeoffa, ne dona*, &c. are good pleas, for a stranger to the deed.

2 W. P. T. 278

16. One of three joint covenantors gives a bill of exchange for part of a debt secured by the covenant, on which bill judgment is recovered: held such judgment to be no bar to an action of covenant against the three; such bill, though stated to have been given for the payment and in satisfaction of the debt, not being averred to have been accepted as satisfaction, nor to have produced it in fact.

Drake v. *Mitchell & al.* 3 E. R. 251

17. To debt on bond conditioned for performance of articles in an agreement referred to, a plea of performance generally was held bad on special demurrer, because it did not appear but that some of the articles might be negative or disjunctive.

E. of Kerry v. *Baxter.* 4 E. R. 340

18. *Qu.* If such plea would have been helped by an allegation, that none of the articles were negative or disjunctive. *ib.*

19. So where general performance was pleaded to debt on bond conditioned to perform covenants, and the plaintiff in his replication set out the indenture verbatim and then demurred, shewing for cause that the defendant had not shewn how he had performed the negative covenants: demurrer held good. *Aliter*, If the indenture set out in the replication had contained no negative or disjunctive covenants, in which case the defect of the plea in not setting out the indenture would have been cured. *Plomer* v. *Rain. M.* 17. *G.* 5. *(cited) ib.* 344, *n.*

20. To debt on bond conditioned for the payment of a sum of money, which the condition stated to have been *taken up, borrowed, and received* by the defendants of the plaintiffs at respondentia interest, secured by a cargo of goods shipped from *Calcutta* to *Ostend*, it is competent to the defendant to plead that the bond was given to secure the price of goods sold by the plaintiffs to the defendants in the *East Indies*, and illegally prepared by the plaintiffs for shipment from thence to beyond the *Cape of Good Hope*, without the licence of the *East India* Company; without proceeding to state formally, that the condition was colourable, to conceal the illegality of the transaction, and to negative that the bond was given for money *taken up, borrowed and received*, &c. For the statement in the plea is rather explanatory of, than absolutely inconsistent with, the transaction stated in the condition of the bond: but if it were inconsistent with it, the plea would still be good in this form.

Paxton v. *Popham.* 9 E. R. 408

(And see PRACTICE, XII.)

21. Accord, and satisfaction made before breach of a covenant, cannot be pleaded in bar of an action on the covenant.

Kaye v. *Waghorne.* 1 W. P. T. 428

22. Plea to *assumpsit*, that the defendant, who was the payee of a promissory note, indorsed it to the plaintiff "for and on account of" the said debt, is a good plea.

Kearslake v. *Morgan.* 5 T. R. 513

23. To a debt on bond conditioned for the payment of a certain sum at a certain day, defendant pleaded that by articles of agreement between the plaintiff, her sister, and the defendant, the interest of the money was to be paid to one of the sisters upon an event which had happened; but as the plea did not allege the payment of the interest accordingly, it was holden bad.

Baldee v. *Elers.* 5 T. R. 250

24. A plea in bar of an avowry for taking damage feasant, that the cattle escaped from a public highway into the *locus in quo*, through the defects of fences, must shew that they were *passing on the highway* when they escaped: it is not sufficient to state, that *being* in the highway they escaped.

Dovaston v. *Payne.* 2 H. B. 527

25. The plaintiff in replevin pleaded in bar to an avowry for damage feasance that the *locus in quo*, from time whereof, &c. ought to be open and common "on or before the 15th of *October*, when the corn was cut and carried, and from thence for a long time, to wit, for three weeks and upwards," that the plaintiff when, &c. put in his cattle "the same time being when the said field was and ought to be open and common *as aforesaid*:" held that the plea was bad for uncertainty, even

after verdict, the right of common being too generally described both in its commencement and conclusion.

Da Costa v. *Clarke.* 1 B. & P. 257

26. In an avowry defendant averred that all those whose estate he now has, &c. *from time whereof, &c.* have been accustomed to have, and of right *during all the time aforesaid* ought to have had, and still of right ought to have common of pasture in the *locus in quo:* held bad, and that it did not amount to an averment of right of common at all times of the year.

Hawkins v. *Eccles.* 2 B. & P. 359

27. If a defendant in replevin plead by way of justification of the taking, that he was *possessed* of a messuage with common appurtenant, and that the plaintiff's cattle were damage feasant, on the common, and conclude in bar without praying a return, it seems that such a plea is bad. *ib.*

28. Replevin of cattle taken in *A.* The defendant avowed the taking in *A.*, under a demise of certain premises of which *B.* was parcel, and because the cattle were damage feasant in *B.* he took them and drove them through *A.* in his way to the pound; and upon general demurrer the avowry was held to be well pleaded.

Abercrombie v. *Parkhurst.* 2 B. & P. 480

29. If to an avowry for 120*l.* rent in arrear, the plaintiff plead "that the said 120*l.* is not due," and the defendant join issue thereon, and at the trial it appear that 24*l.* only is due, upon which the plaintiff objects that the evidence does not support the issue joined by the defendant; yet if a verdict be taken for 24*l.* subject to the opinion of the court, such finding will cure the defect in the formality of the issue. *Cobb* v. *Bryan.* 3 B. & P. 348

30. To a declaration against one upon joint promises by him and another, whom he avers to be outlawed, a plea of *nul tiel record* of outlawry is in effect a plea in abatement, for want of parties: and therefore, if it conclude in bar, it is bad on general demurrer, and the plaintiff is entitled to judgment *quod recuperet*, &c.

Nowlan v. *Geddes.* 1 E. R. 634

31. In justifying a trespass under the process of a foreign court, it seems that the plea should be formed in analogy to similar justifications under the process of our inferior courts: but at any rate a plea which only states that the court abroad was governed by foreign laws that the property seized was within its jurisdiction, that certain legal proceedings were had, according to such foreign laws, against the property in question in such court, having competent jurisdiction in that behalf, *et taliter processum, &c.* that the defendant was ordered by the said court, having competent authority in that behalf, to seize the property, is bad; being too general; and not giving the plaintiff notice whether the defendant justified as an officer of the court, or party to the cause: or of what nature the charge was, or by whom instituted, or what the order of seizure was, whether absolute or quousque, &c.

Collett v. *Keith (Ld.)* 2 E. R. 260

32. No matter of defence arising after action brought can properly be pleaded in bar of the action generally, but it ought to be pleaded in bar of the *further maintenance* of the suit. Therefore where one who was an alien *amy* at the time of the action brought, became an alien *enemy* before plea pleaded, and the defendant pleaded that the plaintiff ought not *to have or maintain* his action, because he was before *and at the time of exhibiting his bill*, and that he *now* is an *alien enemy*, &c.; concluding that therefore the plaintiff ought to be barred from *having or maintaining his action*, &c.; to which the plaintiff replied, that *at the time of exhibiting his bill* he was an *alien amy*; wherefore he *prayed judgment and his damages;* to which there was a demurrer: held that the plea was ill pleaded: But yet, as the court were *ex officio* bound to give such judgment as appeared upon the whole record to be proper, without regard to the issues found or confessed, or to any imperfection in the prayer of judgment on either side; and as it appeared upon the whole that the plaintiff was *now* an alien *enemy*, and therefore incapable of *maintaining further* his suit, judgment was given that he be barred from *further having or maintaining his action.*

Le Breton v. *Papillon.* 4 E. R. 502

33. A plea of *nul tiel record*, pleaded to an action of debt on an *Irish* judgment recovered, must conclude to the country; for though, since the Union, such judgment be a record, yet it is only proveable by an examined copy

on oath, the veracity of which is only triable by a jury *Collins* v. *Lord Viscount Mathew.* 5 E. R. 473

84. Every plea to the jurisdiction of the court ought to give some other court by which the matter may be tried. Therefore it is not sufficient for a native of *Ireland*, charged with the publication of a libel in *Middlesex*, to plead to the jurisdiction of *B. R.*, that *Ireland*, before the union, was governed by its own laws, and not by the laws of *Great Britain*; and that, since the union, it is yet governed by its own laws, &c. and that there always have been, and now are, courts and jurisdictions in *Ireland*, distinct from those in *Great Britain*, and competent for the trial of all offences committed by the natives resident there; and that the defendant is a native of and was resident in *Ireland* at the time of the offence alleged, and that the subject matter of the supposed libel related to things in *Ireland*; for the objection, if any, going to the total want of jurisdiction in any of the courts of this part of the kingdom to try the defendant for such an offence, it should either be taken advantage of by a plea in bar, or by evidence under the general issue. *R.* v. *Johnson.* 6 E. R. 583

85. The plea of an attorney, to an action sued against him by bill, stating his privilege not to be compelled to answer any bill to be exhibited against him *in the custody of the marshal*, &c. and concluding that the Court would not take *further cognizance of the action aforesaid against him*, (instead of praying judgment of the bill, and that it might be quashed), will not be taken as a plea to the jurisdiction, but only as objecting to the Court's taking cognizance of the action against one of its attornies *in that form:* and therefore the Court will adjudge the bill to be quashed.

Chatland v. *Thornley.* 12 E. R. 544

86. The toleration act, 1 *W.* & *M. c.* 18. provides (§ 18) that any person maliciously disturbing any dissenting congregation under that act, on proof before a justice of peace, shall find sureties in 50*l.*, or in default be committed to prison till the next sessions, and on conviction forfeit 20*l.* to the crown. To an action against magistrates for trespass and false imprisonment they pleaded a charge preferred before them for an offence against that clauses and a commitment for want of sureties under it to the next sessions: and that before the next sessions it was agreed between the prosecutor and the now plaintiff, *with the consent* of the committing magistrates (the now defendants), that the prosecution should be dropped, and the plaintiff be discharged at the sessions for want of prosecution; that the plaintiff was accordingly then and there so discharged *in full satisfaction and discharge of the assault and imprisonment:* held this was no legal satisfaction; for either the agreement was illegal, as stifling a prosecution for a *public misdemeanor*, and thereby impeding the course of justice; or the satisfaction, if any, was moving from the prosecutor only, and not from the justices; their authority over the prosecution being at an end after the commitment of the plaintiff, and *their consent* afterwards to the prosecutor dropping the prosecution being a mere nullity, and no satisfaction for a prior injury, if any, received by the plaintiff from their act.

Edgcombe v. *Rodd.* 5 E. R. 294

87. A plea to an action against the marshal, for the escape of a prisoner in custody for a debt, after stating the return of the prisoner into custody after such escape, before action brought &c. ought to shew a detention of him by the officer down to the commencement of the action, or a legal discharge from that detention: and therefore, though the plea only stated, that after the return of the prisoner into custody, the defendant did thereupon *then and afterwards keep and detain* the said prisoner in his custody in execution, &c., under and by virtue of the commitment, &c.: and the replication traversed that after the prisoner's return the defendant did *keep and detain* him in custody in execution, &c., *in manner and form* as stated in the plea; *a detention down to the commencement of the action*, or until a legal discharge from such detention, is virtually implied in the plea and included in the traverse; and therefore the plea is negatived by shewing in evidence, that after the prisoner's return he again escaped and died out of custody.

Chambers v. *Jones.* 11 E. R. 406

88. Difficult questions are not allowed to be pleaded as sham pleas.

Charles & al. v. *Marsden.* 1 W. P. T. 225

VIII. *Prescription, or Usage; Mode of Pleading.*

1. In an action on the case for not repairing a private road leading through the defendant's close, it is sufficient for the *plaintiff* to allege that the defendant, *as occupier* of the close, is bound to repair.
Rider v. *Smith*. 3 T. R. 766
2. But a *defendant*, who prescribes in right of his own estate, must set forth the estate in right of which he claims the privilege. 3 T. R. 766
3. A plea of prescription for common in a *que* estate is good after verdict, though it be not in *express terms* alleged that the owners of the estate have used it from time immemorial.
Clarke v. *King*. 3 T. R. 147
4. In pleading a right to enter a common to dig for and carry away sand and gravel for the repairs of a house, it is necessary to allege that the house was out of repair, that the party entered for the purpose of digging for and carrying away sand and gravel for the necessary repairs of that house, and that the materials were used for that purpose.
Peppin v. *Shakespear*. 6 T. R. 748
5. A charter of *W.* 3. granted to the town of *Liverpool*, directs that the common-councilmen shall be elected in such manner as was used before a former charter of *Car.* 2.; the defendant, to a *quo warranto* information for exercising the office of common-council-man, pleaded, that before the charter of *Car.* 2. the mayor, bailiffs, and burgesses, used to elect (except at those times when there was any bye-law to regulate the mode of election): it was held that the plea was bad, because it did not shew what was the usage in fact before the charter of *Car.* 2. *R.* v. *J. Birch*. 4 T. R. 608
6. A party in pleading may prescribe for *less* than he is entitled to claim.
Tewkesbury (Corp.) v. *Bicknell*. 1 W. P. T. 143

IX. *Profert.*

1. The Court of K. B. *(dissent. Grose* J.) held that a deed may be pleaded *as lost by time and accident*, without profert. *Read* v. *Brookman*. 3 T. R. 151
2. Or *destroyed*. *Tetty* v. *Nesbitt*, *T.* 24 *G.* 3. 3 T. R. 153, *n.*: but if it appear by the record that defendant had *oyer* of a *copy* only, it is error.
Matteson v. *Atkinson*, *E.* 27 *G.* 3. 3 T. R. 153, *n.*
3. If profert be made, nothing but the production of the deed will suffice.
Smith v. *Woodward*. 4 E. R. 585
4. Where in setting forth a conveyance it was stated, that a release was cancelled, "by the seal of the releasor being taken off and destroyed or lost," with a profert of the residue of the deed, the Court of C. P. held this to be good pleading. *Bolton* v. *Carlisle (Bp.) & al.* 2 H. B. 259
5. A defendant in trespass cannot plead by way of justification that he was possessed of a right of common over the *locus in quo* under a deed of grant by a former owner, alleged to be since lost or destroyed by accident and length of time, and therefore not proferred in Court, of which *the date and names of the parties are unknown*.
Hendy v. *Stephenson*. 10 E. R. 55
6. Where there is an assignment of all debts with a power of attorney to the assignee to receive and compound for the same, and to submit them to arbitration, and the assignee on an arbitration has a sum awarded to be paid to him; it is not necessary, in an action upon promises in consequence of the non-payment of such sum, that the assignee, in setting forth the assignment, should make a profert of the same in his declaration.
Banfill v. *Leigh*. 8 T. R. 571
7. No profert need be made of a deed which is only inducement to the action. 8 T. R. 571

X. *Replication.*

(And see *ante* VII.)

1. Where a replication denies the whole substance of the plea, there the plaintiff may tender issue, and conclude to the country; though, indeed, there are exceptions to that rule, where the replication is proper either way: but where the plaintiff selects one out of several facts in the plea, he may traverse that one, and conclude with a verification. 2 T. R. 442—4: (and see 3 T. R. 426.)
2. If defendant plead to debt on bond that plaintiff won money of him at cards, and that the bond was given for securing payment of it; to which the plaintiff replies that it was given to secure the payment of money justly

due, and not for securing the payment of money won; the replication may either conclude to the country, or with an averment.

Hodges v. *Sandon.* 2 T. R. 439

3. To a plea to *scire facias* against bail that the principal died before the return of any *ca. sa.*, a replication stating the particular *ca sa.* and that the principal was alive at the return of that *ca. sa.*, must conclude with an averment: for the *ca. sa.* in the replication is new matter; and, by the rules of pleading, whenever new matter is introduced, the other party must have an opportunity of answering it.

Henderson v. *Withy.* 2 T. R. 576

4. A replication to a plea of "*ne unques accouple*" in dower, alleging a marriage in *Scotland*, may conclude to the country; and in such replication it is not necessary to state that the marriage was had at any place in *England*, by way of venue.

Ilderton v. *Ilderton.* 2 H. B. 145

5. In replying to a plea of infancy, the plaintiff must shew enough in his replication to maintain every part of the declaration. *Trueman* v. *Hurst.* 1 T. R. 40

6. It is a common rule that a replication, when entire, which is bad as to part, is bad as to the whole: (see 1 T. R. 40.) but the rule cannot apply to any case where the objection is merely on account of surplusage. Therefore where the replication states matter sufficient for the plaintiff to maintain his action, even though it state something afterwards which is inaccurate, the whole is not vitiated.

3 T. R. 374

7. To a *quo warranto* information the defendant derived a title in his plea to the office of a burgess under a custom for the common-council to admit *ad libitum* any person of the age of 21, whom they chose: the prosecutor, after denying that custom, replied that no person was entitled to be admitted but in right of servitude, and that the defendant had not served a seven years' apprenticeship; rejoinder stating the special circumstances under which he had served: on a demurrer to this rejoinder, because it was a departure from the plea, the court held the replication itself to be bad, as *immaterial* to the title in the plea; and gave judgment for the defendant.

R. v. *Knight.* 4 T. R. 419

8. Assumpsit against three; two pleaded a debt of record by way of set-off: the plaintiff replied *nul tiel record*, and gave a day to the two defendants, but entered no suggestion respecting the third; held, on demurrer, that the action being discontinued, judgment must be given against the plaintiff, even though the defendant's plea were bad. *Tippet & al.* v. *May & al.* 1 B. & P. 411

8. *a.* To a replication of *nul tiel record* and day given, if the defendant demur, the plaintiff need join in demurrer, but if the record is not produced may sign judgment.

Tipping v. *Johnson.* 2 B. & P. 302

9. Debt on bond conditioned for *J. S.* rendering account to the plaintiffs of all monies which he shall receive as their agent. Defendant pleads performance in the words of the condition. Plaintiffs reply, that *J. S.* received divers sums of money amounting to 2000*l.* belonging and relating to the plaintiffs' business as their agent, and hath not rendered to the plaintiffs an account of the said 2000*l.* or any part thereof. This replication being specially demurred to for generality, was held sufficient by the Court of C. P.

Shum&al. v. *Farrington.* 1 B. & P. 640

9 *a.* So where to debt on bond, conditioned that one *B. R.* should account for and pay over to the plaintiffs as treasurers of a charity, such voluntary contributions as he should collect of the use of the charity, the defendant pleaded general performance: the plaintiffs replied, that *B. R.* had *received divers sums* amounting, to a large sum, *viz.* 100*l.* *from divers persons, for divers voluntary contributions* for the use of the said charity, which he had not accounted for or paid over, &c. It was held by the Court of K. B. on special demurrer, that the replication was sufficiently certain.

Burton & al. v. *Webb. & al.* 8 T. R. 459

10. To a plea of set-off of a sum due under a recognizance, and also of another sum upon a simple contract, it seems that a replication, protesting that the plaintiff did not acknowledge, &c. and then pleading that he was not indebted in manner and form as the defendant had in pleading alleged, and concluding to the country, is bad; inasmuch as it refers matter of record to the cognizance of a jury. But as it

was a sham plea, the plaintiff had leave to amend without payment of costs.

Solomons v. *Lyon*. 1 E. R. 369

11. Plaintiff declared against defendant as acceptor of a bill of exchange, payable to certain persons using the firm of Messrs. *M'Brair, Watson*, and Co.; defendant pleaded that the said Messrs. *M'Brair, Watson*, and Co. had accepted satisfaction; plaintiff replied that the said persons so as aforesaid using the firm of Messrs. *M'Brair* and Co. (leaving out the name of *Watson*) did not accept satisfaction, and concluded to the country. *Semb.* that this variance could only be taken advantage of on special demurrer.

Bell v. *Da Costa*. 2 B. & P. 446

12. A replication to a plea of tender, stating an original writ sued out and returned before the tender, but not proceeded upon, and then a second original writ sued out after the tender, and proceeded upon, but unconnected with the first writ, is no answer to the plea. *Stratton* v. *Savignac*. 3 B. & P. 330

13. Debt on bond conditioned for payment of an annuity of 175*l*. quarterly during the life of *G*.; pleas, payment of the annuity at the days, and payment of the arrears after the days in the condition. Replication, that the Defendant did not pay the annuity or the arrears in manner and form as Defendant alleged, but on the contrary, plaintiff suggested that during the life of *G*. 87*l*. 10*s*. for two quarterly payments became due and was still in arrear, and concluded to the country. On demurrer the Court seemed to think the replication bad, and gave the defendant leave to amend on payment of costs.

De La Rue v. *Stewart*. 2 N. R. 362

14. Trespass *quare clausum fregit*, justification under a distringas in a plea of trespass at the suit of *J. S.* against defendant; Replication, that before the distringas issued against defendant he appeared to answer *J. S.* in the plea of trespass in the said plea mentioned to the said writ sued out by *J. S.* for that purpose, to wit a *clausum fregit* issued out of *C B. prout patet* &c. defendant rejoined *nul tiel record*; held, that the record of appearance to a *clausum fregit* issued out of Chancery did not support the replication, and that the words which followed the *scilicet* being material could not be rejected. *Myers* v. *Kent*. 2 N. R. 463

15. To an action on a replevin bond, conditioned for the defendant to prosecute his suit below *with effect*. and alleging a breach in his not prosecuting it according to the tenor and effect of the condition, but therein failing and making default, it is a good defence to plead that the defendant did appear at the next county court, and there prosecuted his suit, which he had there commenced against the now plaintiff, and which suit was *still depending and undetermined*: and such plea is not avoided by replying that the defendant did not prosecute his suit as in the plea mentioned, but *wholly abandoned the same*, and that the said suit *is not still depending*; without shewing how it was determined and ceased to depend.

Brackenbury v. *Pell*. 12 E. R. 585

16. *A*. having the exclusive right to dig stone in a certain close, avowed distraining the cattle of *B*., who had the exclusive right of pasture there, as damage feasant, for having broken the stones: *B*. pleaded that there was no fence to keep them off, nor did *A*. otherwise guard or protect the stones, *A*. replied that he was not bound to fence: and on demurrer the replication was held bad.

Churchill v. *Evans*. 1 W. P. T. 529

XI. *Title.*

(And see DIVISION II.)

1. When a plaintiff in possession brings an action on the case against a wrongdoer, it is sufficient to declare generally, without disclosing any title: but when a defendant justifies under a right, it must be set out formally in the plea.

Grimstead v. *Marlowe*. 4 T. R. 718

2. An averment in a declaration on stat. 11 *G*. 2. *c*. 19. § 3. to recover double the value of goods removed in order to prevent a distress, that 57*l*. was *due for rent* before the goods were removed, need not be precisely proved as laid with respect to the sum.

Gwinnet v. *Phillips*. 3 T. R. 643

3. The rule is, that if a plaintiff allege any thing which forms *a constituent part of his title*, he must set it out correctly: but here it was immaterial to state what the rent was, and therefore it need not be proved.

3 T. R. 645

4. But with respect to actions on *contracts*, there the whole of the contract must be proved which is set out.
3 T. R. 646
5. The same of records. *ib.*
6. The omitting to state the consideration of a bargain and sale, cannot be taken advantage of on a general demurrer. 2 H. B. 261
7. In trespass for taking and driving the plaintiff's cattle, to which there was a justification, that the defendant was *lawfully possessed* of a certain close, and that he took the cattle there damage feasant; the plaintiff may specially reply title in another, by whose command he entered, &c. and it does not vitiate the replication that it unnecessarily proceeded farther to give colour to the defendant.
Taylor v. *Eastwood.* 1 E. R. 212

XII. *Traverse.*

1. In *quare impedit* the plaintiff having stated his title in the declaration, the defendant pleads his own title in bar in deducing which several incidental points are also stated; the plaintiff in the replication sets forth essential matter, which would fully avoid the defendant's title, but does it by way of inducement to a traverse of one of those incidental points, with which traverse the replication concludes; the defendant in the rejoinder takes no notice of the traverse in the replication, but *traverses the matter of inducement* which precedes it. This rejoinder is good, and may well *pass by the traverse* in the replication, that *traverse being an immaterial one.*
Thrale & al. v. *London (Bishop) & al.* 1 H. B. 376
2. To trespass for fishing in the plaintiff's fishery, the defendant pleaded that the place is an arm of the sea in which every subject has a right to fish; the plaintiff in his replication claimed an exclusive right by prescription, traversing the general right; it was held by the Court of K. B. that the defendant ought to take issue on the traverse, and not to traverse the prescriptive right claimed by the plaintiff; for that the first traverse was a material one, and would put in issue the true question in dispute between the parties. *Orford (Corp.)* v. *Richardson.* 4 T. R. 437
3. But on error in the Exchequer Chamber, it was determined, that the plaintiff's traverse of the general right was bad; and that the defendant therefore might well pass by it in the rejoinder, and traverse the prescriptive right of the plaintiff stated in the replication.
Richardson v. *Orford (Corp.)* 2 H. B. 182
4. If to trespass in the common called *A.* the defendant plead that *A.* and *B.* commons lie open to each other, and then prescribe for a right in both commons, the plaintiff must traverse the *whole* prescription,
Morewood v. *Wood.* 4 T. R. 157
5. For all prescriptions are entire, and, when pleaded, the adverse party cannot deny a part only, but must deny the whole. 4 T. R. 157
6. Plea (to trespass) that an *ancient* messuage and 12 acres of land were immemorially parcel, and a customary tenement, of the manor of *A.*; and that there is a custom in the manor "that from the time whereof, *&c.* the customary tenant of the said customary tenement for all the time aforesaid has had right of common, *&c.*" A replication *traversing the custom* does not admit *the antiquity of the messuage*: but the plaintiff may prove that it was built within 20 years, and not upon the scite of an ancient house,
Dunstan v. *Tresider.* 5 T. R. 2
7. To debt on bond dated 20th *July*, conditioned for repayment of the principal with interest at 5 *per cent.* from 24th *June* preceding, defendant pleaded that there was a corrupt agreement between plaintiff and defendant that the former should lend the principal sum on 20th *July*, to be repaid with interest from 24th *June* preceding, which exceeds legal interest, and that the bond was given in pursuance thereof; the plaintiff, in his replication, traversed the corrupt agreement, and defendant demurred; judgment was given for the plaintiff, because the demurrer admitted the non-existence of any corrupt agreement.
Grimwood v. *Barrit.* 6 T. R. 460
8. In trespass *quare clausum fregit*, if the defendant plead soil and freehold in another, by whose command he justifies the trespass, such command may be traversed by the plaintiff.
Chambers v. *Donaldson.* 10 E. R. 65

XIII. *Videlicet.*

1. Where any thing is pleaded under a *videlicet*, the party is not concluded by it: *secùs*, where there is no *videlicet*.
Symmons v. *Knox*. 3 T. R. 68
2. The want of a *videlicet* may in some cases make an averment material, which would not otherwise be so: but the addition of a *videlicet* cannot render a material averment immaterial.
Grimwood v. *Barrit*. 6 T. R. 460
3. In an action on a bond the defendant must set forth in the plea the sum really due on the bond, before he is entitled to set off any cross demand on stat. 8 *G.* 2. *c.* 24. § 5.
Grimwood v. *Barrit*. 6 T. R. 460
(And see tit. SET-OFF 3.)
4. Such averment is traversable though laid under a *videlicet*, the averment being material. 6 T. R. 460
5. An allegation in pleading which is sensible and consistent in the place where it occurs, and not repugnant to *antecedent* matter, cannot be rejected as surplusage, though laid under a *videlicet*, and however inconsistent with an allegation *subsequent*.
R. v. *Stevens & Agnew*. 5 E. R. 244

(POOR (OVERSEERS OF.)

I. *Appointment.*

1. A woman may be appointed an overseer of the poor.
R. v. *Alice Stubbs*. 2 T. R. 395
3. The word *substantial* as applied to overseers in stat. 43 *Eliz. c.* 2. must be understood relatively. 2 T. R. 395
3. Where a district contains only three houses, the inhabitants of all three may be appointed overseers of the poor, notwithstanding two of them are labourers and poor. 2 T. R. 395
4. Appointment of overseers by two justices *separately* is bad; for, where magistrates are to execute a judicial act, they must meet and execute it together. 3 T. R. 38
(And see JUSTICES I. 6, &c.)
5. After an appointment of four overseers for a parish by the magistrates at one meeting, they are *functi officio*; and no other magistrates can afterwards, upon the claim of one of the persons so appointed to be exempted, appoint another in his place; but the party must appeal to the sessions to get his discharge. *R.* v. *Great Marlow (Inhab.)* 2 E. R. 244
6. And this objection to the second appointment may be disclosed to this court on affidavit, upon the removal of the appointment hither by *certiorari*, who will thereupon quash the same. 2 E. R. 244
7. But overseers need not be appointed by one and the same instrument.
4 T. R. 552
8. An appointment of overseers, dated in *October*, for a year next ensuing the date, is good, because it shall be understood to be the overseer's year.
2 T. R. 395: and *R.* v. *J. Burder*.
4 T. R. 778
9. The parishioners (as well as the overseers appointed) may appeal to the sessions under stat. 43 *Eliz. c.* 2. against the appointment of overseers.
R. v. *Forrest*. 3 T. R. 38
10. To entitle any district of a parish to have separate overseers, it must be shewn to be a township; and that the parish cannot have the benefit of stat. 43 *Eliz.*, that is, cannot maintain their own poor as a parish. 1 T. R. 376, 7
11. Where a parish, consisting of several townships, some of which maintain their own poor, has immemorially had more than four overseers, that is a proof that they cannot have the benefit of stat. 43 *Eliz.*; and entitles each township to have separate overseers. 1 T. R. 374
12. But though a parish had at no time antecedent to the year 1773—5 had the benefit of this statute, but had always had five overseers appointed separately, two each for two districts, and one for a third, and two of the districts having agreed in 1773 to act together, to which the third acceded in 1775, and there having been but four overseers since that period who had been appointed for the *whole* parish, the Court held that such agreement at the time acted upon for 30 years past, was proper evidence for the jury to decide that the parish could in fact enjoy the benefit of the statute.
Lone v. *Cobham & al.* 7 E. R. 1
13. Wherever there is a constable there is a township. 1 T. R. 374
14. Where a parish consisted of two separate districts, each of which immemorially made a separate rate, but the money when raised was blended together in one joint fund, though applied in certain proportions, and the sessions did not find it as a fact that the parish could not reap the be-

nefit of stat. 43 *Eliz.* it was held that the districts were not entitled to maintain their own poor separately, though since the year 1648 they had constantly had, on the whole, more than four overseers, some of whom were chosen separately by the hamlet, and though the hamlet part had immemorially had a constable of its own, and since 1709 certificates had been granted to and from the hamlet to third parishes, and orders of removal made to and from it.

R. v. *T. Newell.* 4 T. R. 266

15. Where a township had for sixty or seventy years past (and before, for any thing that appeared to the contrary) had separate overseers, and maintained its own poor separately from the parish at large, it was held that it was still entitled to the same privilege.

R. v. *Leigh (Inhab.)* 3 T. R. 746

16. Whether or not a parish can have the benefit of 43 *Eliz.* by maintaining its poor with not more than four overseers, is a fact which the sessions ought to find, and not leave it to the Court of K. B. to presume.

R. v. *Watson.* 7 E. R. 214

17. Although a parish might not have had the benefit of the stat. 43 *Eliz. c.* 2. before and at the passing of the stat. 13 and 14 *Car.* 2. *c.* 12.; but perhaps at that period, and certainly for a long course of years antecedent to the years 1773-5 maintained its poor in separate districts, yet it was competent to the parishioners at the latter period to cease acting under the statute of *Car.* 2., and to recur to the general provision of the stat. 43 *Eliz.* by maintaining their poor as one entire parish: and having so done from the year 1775, the Court refused a mandamus to the justices of peace to appoint separate overseers as before that time.

R. v. *Palmer.* 8 E. R. 416

18. An order of justices which appointed *A.*, "being a substantial householder of the parish of *B.*, to be overseer of the poor in the hamlet of *C.* in the said parish," was confirmed generally at the sessions with costs: and both those orders were affirmed here.

R. v. *Morris.* 4 T. R. 550

19. An appointment of one overseer alone for a township is bad in law; the stat 13 & 14 *Car.* 2 *c.* 12. requiring at least two.

R. v. *Clifton (Inhab.)* 2 E. R. 168

II. *Accounts.*

(And see POOR RATE III.)

The accounts of an overseer of the poor should be settled at the end of the year; and if a person be appointed overseer for four successive years, and do not make any rate in the three first to reimburse himself what he expends in those years, he cannot in the fourth year make a rate for that purpose. *R.* v. *Goodcheap.* 6 T. R. 159

POOR RATE.

I. *What Persons and Property liable to.*

1. The occupier of land is rateable to the poor, and it is immaterial by what tenure he holds it, or whether he has any title. 1 T. R. 343; 7 T. R. 590 —So the bare possession of personal property is evidence from whence the justices may draw the conclusion that the possessor should be rated. (See *post* III. 3.) 6 T. R. 53

2. Where a corporation was seised in fee of certain uninclosed lands, which were stocked with the cattle of the resident burgesses, or the widows of such, who alone were permitted by the burgesses to claim such right, and also by poor parishioners, who were admitted to such enjoyment from charity; and such lands were altogether omitted out of the poor-rate; the Sessions, on appeal by one who had given notice of his objection to the parish officers, and to the corporation as the party interested under the stat. 41 *G.* 3. *c.* 23 § 6., having quashed the rate, the court confirmed that order.

R. v. *Aberavon (Inhab.)* 5 E. R. 453

3. Where a corporation were seised in fee of lands, which by the custom were annually meted out under their control by a leet jury, according to a certain stint, to such of the resident burgesses who chose to stock the same; they paying 19*s.* 4*d.* to each of the other burgesses who did not stock: held that the burgesses who so stocked were *tenants in common* of the lands so occupied by them, and as *such occupiers* were liable to be rated for the same.

R. v. *Watson.* 5 E. R. 480

4. An act of the 48 *G.* 3. having vested the aftermath of a certain meadow in trustees in trust for the burgesses and principal householders of *Tewkesbury*, freed from all other interest in the same

with power to let the same or any part thereof annually, to any person for the best rent, *and also to let it in* PASTURES, for horses, cattle, and sheep, to different persons at such rates and subject to such regulations as the trustees should appoint; or by writing under their hands and seals, to demise the same for a term of years, &c. and that the rents and profits should after payment of all charges be divided by the trustees, amongst the objects of the trust: held that the trustees not having let the aftermath to any persons for any certain term or in any certain proportions, but having let it out in pastures at so much a head for horses, cattle, and sheep, to various persons must themselves be taken to be the occupiers of the land and were consequently rateable for the same.

R. v. *Tewkesbury* (*Burgesses' Trustees*) 13 E. R. 155

5. Personal property, if visible, and yielding a certain annual permanent profit, is rateable.

R. v. *Hogg.* 1 T. R. 727

6. So that a house and engine for carding cotton, which are rented as one entire subject, and described by the general name of an engine-house, may be rated. 1 T. R. 727

7. So may the profits of a weighing-machine house. *R.* v. *St. Nicholas, Gloucester, E.* 27 *G.* 3. 1 T. R. 723, *n.*

8. Ships are rateable in the parish to which they belong.

R. v. *S. White.* 4 T. R. 771

9. But household furniture is not *ib.*

10. Neither is money, whether at interest or not. *ib.*

11. Nor the pay of officers in the navy, or of merchants' ships. *ib.*

12. Nor the salary of officers of the customs, or merchants' clerks. *ib*

13. Nor any attorney in respect of the profits of his profession.

R. v. *Startifant.* 7 T. R. 6.

14. The owners of the packet-boats employed under a personal contract with the post masters in carrying the mails, &c. between *Holyhead* and *Dublin*, are liable, in respect of the profits accruing to them from the carriage of passengers and luggage in such boats, to be rated for the same to the relief of the poor in the parish of *Holyhead where such owners reside*, and from and to which the boats sail, where they are repaired, and where the passage-money is in part receivable and is collected; though they are registered in another place.

R. v. *Jones & al.* 8 E. R. 451

15. Under a local act, 10 *Ann. c.* 6. for rating persons to the relief of the poor in *Norwich* for lands, &c. stock, and personal estates in the parish, &c., and *money out at interest*; they are not liable to be rated for *government stocks or funds*, which are no more than perpetual annuities, the principal of which can never be recalled by the holder from government, though redeemable at the pleasure of the latter.

R. v. *St. John Maddermarket in Norwich (Churchward.)* 6 E.R. 182

16. Stock in trade is rateable when its value can be ascertained. 6 T.R. 154 and *R.* v. *Darlington (Inhab.)* 6 T. R. 468 and see 4 T. R. 771.

17. The circumstance of a person's having been rated for his stock in trade one year is *primâ facie* evidence that it is productive the next year, and if not contradicted by other evidence is sufficient to warrant the justices to decide that it should be then rated. 6 T. R. 468

18. Silk throwsters, working up in their mills the silk of their employers sent to them for that purpose, are not liable to be rated in that respect, as for their stock in trade.

R. v. *Sherborne (Inhab.)* 8 E. R. 587

19. The possessions of the crown, or of the public are not rateable. 2T.R.372

20. Stables, rented by the colonel of a regiment by order of the crown for the use of the regiment are not liable to be rated.

Ld. Amherst v. *Ld. Somers.* 2T.R.372

21. But persons holding houses or lands under the crown, or under any hospital, *if for their own separate benefit*, are liable to be rated. (See *post* 39.) 3 T. R. 497

22. Where the commanding officer in barracks had distinct apartments allotted to him, one in particular for transacting the business of the regiment, and the others fitted up for the accommodation of himself and his family, who resided there with him, containing amongst others a kitchen, wash-house, and coach house, together with a stable, yard, and garden: held that he was rateable to the relief of the poor for the same, having a beneficial enjoyment of them beyond his

necessary accommodation *as an officer* for the purpose of *public* service.
R. v. *Terrott.* 3 E. R. 506

23. The ranger of a royal park is rateable as for inclosed lands in the park yielding certain profits.
Lord Bute v. *Grindall.* 1 T. R. 338
Affirmed in *Cam. Scac.* 2 H. B. 265
(See *Eyre*, C. J.'s observations on the loose and inaccurate statement of the special verdict.)

24. But he is not rateable for the herbage and pannage, which yield no profits. 1 T. R. 338

25. Where the farmer is rated for the whole farm it is no ground of objection to the rate by a third person, that a dairyman who rented under the farmer his stock of cows to be depastured on the same land, was not rated for such dairy; although it were stated in the case that the dairyman made a profit of the produce of the cows, independent of the profits made by the farmer. For though such a taking of a dairy be a taking of a tenement in law, which will confer a settlement, yet that is in respect of the interest in the land; and the rate upon the farmer, for the whole farm, includes all the profit of the land and the stock appertaining to it: or considering the cows as personal stock, distinct from the land, they are the personal stock or capital of the farmer, not of the dairyman; and the latter only makes his profit by his labour out of the capital stock of another.
R. v. *Brown.* 8 E. R. 528

26. The lessee of a coal-mine is liable to be rated, though he derive no profit from the mine, the mine being rateable property. *R* v. *Parrot.* 5 T. R. 593

27. But where a coal-mine becoming unproductive ceases to be worked, the lessee is no longer liable to be rated for it to the relief of the poor, although he be still bound by his covenant to pay the rent reserved to his landlord Aliter, where the mine is itself productive, although it be worked to a loss by the lessee, after deducting the proportion of the gross value of the produce reserved to the owner.
R. v. *Bedworth (Inhab.)* 8 E. R. 387

28. Landlords not resident within the parish, having leased lead mines and other minerals, with liberty to the tenants to dig, &c.; reserving a certain annual rent, and also certain proportions of the ore which should be raised, are not at any rate assessable to the relief of the poor for such certain rent, no ore being raised; whatever the question might be as to the proportion of ore reserved when in fact any should be found.
R. v. *Rochester (Bp) & al* 12 E. R. 353

29. Lime-works are rateable in the hands of the occupier, though there be risk and expense in the working, and the profits be uncertain. *R.* v. *Alderbury (Churchwardens).* 1 E. R. 534

30. A *slate work* (or, as improperly called, a slate *mine*) is rateable.
R. v. *Woodland (Inhab.)* 2 E. R. 164

31. Iron mines are not rateable.
R. v. *Cunningham.* 5 E. R. 478
(And see *post* III. 3.)

32. The occupier of a clay-pit is rateable. 8 E. R. 528

33. *Saleable underwoods* are rateable annually to the relief of the poor, within the construction of the stat. 43 *Eliz. c.* 2. in proportion to their value, though they should happen not to be cut down more than once in 21 years; and their annual value may be estimated, amongst other ways, according to the value they may be worth to rent for a lease of the duration of their intended growth.
R. v. *Mirfield (Inhab.)* 10 E. R. 219

34. A person entitled to toll tin and farm dues (which are certain portions of the tin raised by the adventurers in the tin-mines) is liable to be rated in respect thereof.
R. v. *St. Agnes.* 3 T. R. 480

35. The tolls of a lighthouse situated in the township of *Tynemouth*, which tolls were collected out of the township in the several ports at which the vessels passing by the coast afterwards arrived, are not rateable, *quâ* tolls, in the township. *R.* v. *Inhab. of Tynemouth.* 12 E. R. 46

36. And the residence in such lighthouse by one as servant of the owner, at an annual salary, to take care of the light, is the occupation of the master, who alone can be rated in respect of such occupation of the toll-house.
12 E. R. 46

37. If *A.* has an exclusive right of using a way-leave over land which he holds in common with *B.*, paying *B.* a certain sum yearly, and has the privilege of using a way-leave occupied by *C.* paying him so much *per* ton

for the goods carried over it, *A.* is not liable to be rated in respect of either of such way-leaves, they being mere easements.

R. v. *Jolliffe.* 2 T. R. 90

36. Qu.—Whether the owner of the land, who receives a profit for such way-leave, is not liable to be rated for such an increase of value. 2 T.R.90

39. And where *A.* having granted to *B.* a lease for years of way-leaves, for the purpose of carrying coals) and the liberty of erecting bridges, and levelling hills over certain lands, *B.* made the waggon-ways, inclosed them thereby excluding all other persons, erected bridges, and built two houses on the land for his servants; it was held that *B.* was liable to be rated to the poor for "the ground called the waggon-way." *R.* v. *Bell.* 7. T.R.398

38. Fish are tithable by custom; and the proprietors of such tithes are liable to be rated.

R. v. *T. Carlyon.* 3 T. R. 585

39. Property is not rateable to the poor, unless there be some person in the beneficial occupation of it. 4 T.R.730

40. Therefore where by an act of parliament the commissioners of a navigation were authorised to take certain tolls, the whole of which were directed to be applied to public purposes, it was held that the tolls were not rateable to the poor. *R.* v. *Salter's Load Sluice Navigation.* 4 T. R. 730

41. An act of parliament having empowered the Duke of *Bridgewater* to erect a lock upon the *Rochdale* canal, and to receive at such lock certain rates or tolls upon goods in vessels navigated from that canal into his own, as a compensation for the profits arising to him from certain wharfs at *Manchester*, which were sacrificed for the public benefit in that navigation; held that a poor's rate on his trustees, occupiers of the "*Rochdale canal lock, tunnel, dues, or rates.*" (which *dues* or *rates* are only other names for the *lock* rated therewith) is good, though the trustees were found not to be *inhabitants* of the township for which the rate was made.

R. v. *Sir A. Macdonald & al.* 12E.R.324

42. The trustees of a quakers' meeting-house, of which no profit is made by the pews, &c. are not rateable.

R. v. *Woodward.* 5 T. R. 79

43. Lands purchased by a company, and converted into a dock, according to an act of parliament, which declares that the shares of the proprietors shall be considered as *personal property*, are rateable in proportion to the annual profits. *R.* v. *The Dock Co. of Hull.* 1 T. R. 219

46. Commissioners under the *Beverley* and *Barmston* drainage act, who purchased land and erected buildings in the parish of *Sulcoates* for the outlet of the drainage, but who received no benefit from such property in *Sulcoates*, but the whole benefit was derived to the owners of lands in other parishes, drained by means of such outlet, are not rateable in *Sulcoates* for such benefit.

R. v. *Sulcoates (Inhab.)* 12 E. R. 40

47. If the owner of a house occupy part of it, he is liable to be rated for the whole, unless there be a distinct occupation of the rest by some other person. *R.* v. *Mary the Less, Durham.* 4 T. R. 477

48. One who went from home with his family for nearly a year, but left his assistant to carry on his business in his shop in one room of the house, which for this purpose was parted off by laths from the rest, and left the key of the house-door with a friend, and had the garden cultivated for his own benefit as usual, is liable to be rated to the relief of the poor, as occupier of the whole house.

R v. *Aberystwith (Inhab.)* 10E.R.354

49. A person employed by the Philanthropic Society to superintend the children at annual wages, under an agreement that he shall have "a dwelling free from taxes," &c. with certain other perquisites, and who may be dismissed at a minute's warning on receiving three months' wages, is not rateable as the occupier of the house provided by the society, she having no distinct apartments in the house but a bed-chamber, and her family not being allowed to live there.

R. v. *S. Field.* 5 T. R. 587

50. A master of a free-school, appointed by the minister and inhabitants of the parish under a charitable trust, whereby a house, garden, &c. were assigned "for the habitation and use of the master and his family, freely without payment of any rent, income, gift, sum of money, or other allowance, whatsoever," for the teaching of ten poor boys of the inhabitants, is rateable for his occupation of the same,

R. v. *Catt.* 6 T. R. 332

51. The objects of a charitable foundation in the actual occupation of the alms-house and lands for their own benefit in the manner prescribed by the rules of the institution, and liable to be discharged for any breach of such rules, are rateable in respect of such occupation.
R. v. *Munday.* 1 E. R. 384

52. Where the Sessions found that the master-gunner at *Seaford* was the *occupier* of the battery-house there, which was the property of the crown, and from whence he was removeable at pleasure: it was held that the *fact* found of his being the *occupier* precluded any other question, and fixed his liability to be rated.
R. v. *Hurdis.* 3 T. R. 497

53. The Court is not precluded by the Sessions stating in the case "that the party rated is the occupier," from examining into the propriety of that conclusion, if the Sessions also state all the circumstances of the case, and desire to have the opinion of this court upon the whole. 5 T. R. 587

54. Every person is to be rated according to the present value of his estate, whether that value has or has not been increased by his own improvements. *R.* v. *Must.* 6 T. R. 154

55. A lessee of lands should be rated according to the present value of the lands. *R.* v. *Skingle.* 7 T. R. 549

56. An exemption in a private statute in 12 *Car.* 2. of lands given to charitable purposes "from all *public* taxes, charges, and assessments whatsoever, civil or military," extends to the poor's rate. *R.* v. *J. Scott.* 3 T. R. 602

57. By the construction of the statute 39 and 40 *G.* 3. *c.* 47. the *London* Dock Company are liable, even during the first 12 years of their establishment, to be rated for the fair annual value of their *warehouses* and other works which are finished and productive, though all the works directed by the act be not completed. But such completed works must under such circumstances be rated for their value at the rate of $8\frac{1}{2}d.$ in the pound; such being the rate calculated upon by the legislature to raise 139*l.* 8*s.* 7*d.* per quarter upon 3,966*l.* the average rental for 10 years preceding the statute, on the premises destroyed by the company in making their works; and which quarterly sum the company were at all events bound to pay to the parish during the 12 years, or until the works were completed, whether those works were productive or not. But when productive beyond that sum, the surplus is to be taken in the first instance by the company; in order to reimburse themselves what they may have advanced to the parish, to make good the deficiencies, before any such productive surplus existed, until the company shall be reimbursed. Therefore until these purposes are effected, a rate made on the increased real value of the dock premises at more than $8\frac{1}{2}d.$ in the pound, or a rate of $8\frac{1}{2}d.$, in the pound on the old average value of the premises before the erection of the company's works, and below the increased value of the new works, is in either case bad. *R.* v. *St. George, Middlesex (Inhab.)* 9 E. R. 127

II. *The Manner and Purpose of raising.*

1. A person shall be rated for profits where they become due, not where they happen to be received. 2 T. R. 660

2. Where a navigation ran from *A.* to *B.* through several intervening parishes, and the tolls for the whole navigation were collected in these two parishes, the court held they might be assessed in these two parishes for the whole amount according to the proportion collected in each.
R. v. *Aire & Cald. Navig.* 2 T. R. 660

3. A barge-way and toll-gate in the hamlet of *Hamptonwick*, purchased by the city of *London* by virtue of stat. 17 *G.* 3. *c.* 18. (for completing the navigation of the *Thames*, and empowering the city to levy tolls and duties towards the charges of the navigation) was held to be rateable for such tolls as became due there, notwithstanding the tolls were collected in another parish. *R.* v. *Mayor, &c. of London.* 4 T. R. 21

4. So where a navigation act empowered the proprietors to take so much *per mile per* ton for all goods carried along the canal: held that they were rateable to the poor for the tolls in the different parishes where the tolls became due, that is, *where the respective voyages finished*, though for their own convenience they were authorized to *collect* the toll where they pleased, and did in fact collect them in other parishes. *R.* v. *Staffordshire & Worcestershire Canal Navigation.* 8 T. R. 340

5. Where by a navigation act the proprietor was entitled to a toll of 4*s.* *per* ton for goods carried from *A.* to *B.*,

or from *B.* to *A.*, and to a proportionable sum for any less distance; and was also enabled to appoint any place of collection; it was held that the tolls for goods carried the whole voyage from *A.* to *B.* were rateable in *B.* though in fact they are collected in a parish between *A* and *B.*; because the tolls become due where the voyage is completed. *R.* v. *Page.* 4 T. R. 543

6. Where goods are carried along two different lines of canal, one of which is by statute exempted from being rated in respect of *tolls*, and the other not; though the voyage happen to finish on the unexempted line, where the tolls became due and are received, yet the canal company shall not be rated for more than such proportion of the tolls as accrued in respect of the carriage along the unexempted line. And the toll arising in respect of so much *per* ton *per* mile is to be rated only for so many miles as the goods were carried along the unexempted line. And where the act directs that the tolls should be exempt from any taxes, rates, &c. other than such as the *land* which should be used for the purpose of the navigation would have been subject to if the act had not been made; that goes to exempt the *tolls*, qua *tolls*, altogether from being rated in respect of the line so exempted, leaving the *land* rateable as before. *R.* v. *Leeds & Liverpool Canal Company.* 5 E. R. 325

7. Where a statute says that a company shall not be liable to any rates which had not *usually* been assessed: that only means that they shall not have any other *kind* of rate imposed on them than those which were then levied, but does not fix the proportion, of the rate. 2 T. R. 660

8. The lessee and occupier of an ancient and exclusive ferry, not being an *inhabitant resiant* within the township in which one of the *termini* of the ferry is situated, is not liable to be rated there for any share of the tolls of such ferry: for supposing a ferry to be *real* property, it is not such real property as is mentioned in the stat. 43 *Eliz. c.* 2. the occupancy of which subjects the party to be rated to the relief of the poor of the place. And all the cases where parties have been rateable in respect of the occupancy or receipt of tolls (apart from the question of inhabitancy) have been where they at the same time occupied real visible property connected with such tolls in the place where they were rated. *R.* v. *Nicholson*, *E.* 50 *G.* 3. 330

9. The owner of a ferry residing in a different parish, but taking the profits of the ferry on the spot by his servants and agents, is not rateable for such tolls in the parish where they were so collected, and where one of the *termini* of the ferry was situated, and on which shore the ferry boats were secured by means of a post in the ground; the soil itself at the landing places being the king's common highway; and the owner of the ferry having no property in, or exclusive possession of it.

Williams v. *Jones.* 12 E. R. 346

10. The lessee of the *tolls* of a public bridge is not rateable as such, whatever rent he may pay; it not appearing that he was the *occupier* of any local visible property within the parish, nor that he was an *inhabitant resiant* there, deriving profit there from such tolls beyond the rent paid by him for the same, which was applicable to the public purposes of the bridge. *R.* v. *Eyre.* 12 E. R. 416

11. If a poor-rate be not published in the church on the *Sunday* next after it is allowed, it is a nullity; and payment under it cannot be enforced, though there be an appeal to the Sessions which was dismissed.

R. v. *Newcombe.* 4 T. R. 368

12. But it is not necessary to state in a reserved case, that the rate was regularly published in the church, if that question was not intended to be referred. 2 T. R. 660

13. County justices cannot rate a parish within their jurisdiction, *in aid* of another parish, lying within a borough which has an exclusive jurisdiction, though within the same hundred and county. *R.* v. *T. Holbeche.* 4 T. R. 778

14. An order for taxing one parish in aid of another under the 43 *Eliz.* was held well; although the two parishes, together with others, were incorporated for the maintenance of their poor, with fixed quotas of contribution, between each other, under special officers, who were empowered to purchase land for the erection of poor-houses, and for a burial-ground; their being a proviso in the act in general terms, that nothing therein contained should extend to repeal or lessen the power of justices of

the peace " to tax *parishes* in aid of others by virtue of the statute 43 *Eliz.* as fully as if this act had not been made." *R.* v. *St. Helen, Worcester.* (*Inhab.*) 2 E. R. 417

15. The granting of a warrant of distress by magistrates to enforce payment of a poor-rate is a judicial, not a ministerial act; they ought first to summon the party, and hear what he has to say in his defence.

Harper v. *Carr.* 7 T. R. 270

III. *Appeals against, Quashing,* &c.

1. If a poor rate be legal on the face of it, though stated to be made for illegal purposes, the court will not quash the rate, but will leave the parties aggrieved to appeal against the allowance of the overseers' accounts if the money be improperlp applied. 5 T. R. 346

2. A private act, relating to *Gloucester*, enables the overseers, &c. to make a rate for the relief of the poor, and to include in it such just and reasonable sums as they shall be put to in the execution of their offices: they made a rate, the title of which expressed it to be for both those purposes; and this court would not quash it, though the sessions on appeal stated in a case that it was partly made to pay a debt incurred by the late overseers; the rate itself appearing on the face of it to be legal. *R.* v. *Gloucester* (*Mayor*, &c.) 3 T. R. 346

3. *Iron mines* are not rateable to the relief of the poor; and being rated conjointly with *coal mines*, the coal whereof was raised by *the owner of the lands for his own use* in smelting the iron, the order of sessions confirming such rate generally, without ascertaining the proportion at which each was rated, was quashed. *R.* v. *Conningham.* 5 E. R. 478

4. Where a person is *overcharged* in a poor rate, the sessions may relieve him on appeal, and amend the rate, by lessening the sum assessed on him under stat. 17 *G.* 2. c. 38. *R.* v. *Cheshunt, (Inhab.)* 2 T. R. 623

5. But if the name of any person be *omitted* in the rate, the justices ought to quash the rate, and not amend it by adding his name. *R.* v. *Maddern (Churchwardens)*, 1 T. H. 625: and *R.* v. *Darlington (Inhab.)* 6. T. R. 468

6. On an appeal against a poor rate, because *A.* and *B.* were not rated for their stock in trade, the sessions quashed the rate, and stated that *A.* and *B.* were in possession of so much stock in trade, &c. but that it was not proved at the sessions, whether it belonged to *A.* and *B.*, or whether it produced profit: this Court quashed the order of sessions. *R.* v. *Dursley (Inhab.)* 6 T. B. 53

7. The justices below are the proper judges of the equality of poor-rates: and the Court of *B. R.* will not interfere on the ground of their being unequal, unless the inequality be manifestly apparent on the rate. 2 T. R. 660

8. Appeal against a poor-rate must be to the sessions next after the allowance of it. *R.* v. *J. Atkins.* 4 T. R. 12

9. And if at a subsequent sessions it be dismissed for not having been made in time, and it be removed by *certiorari* into *B. R.*, the court will not go into any objection appearing upon the face of it. 4 T. R. 12

10. Notice of an appeal against a poor-rate must be given to the churchwardens or overseers of the parish making the rate, by stat. 17 *G.* 2. c. 38. 1 T. R. 627

11. But it is not necessary for the appellant to give notice to the person whose name is omitted in the rate. 1 T. R. 627

12. Trespass will not lie for a distress for non-payment of the poor-rate, if the objection to the rate be that it is made for six months: if the party object to the rate on that ground, he must appeal to the sessions. *Durrant* v. *Boys.* 6 T. R. 580

13. If a party appeal against a poor-rate on the ground that he has no rateable property in the parish, the respondents must first establish their case. *R.* v. *Newbury (Inhab.)* 4 T. R. 475

14. Where the appellant disputed before the sessions the quantum of the rate, as well as the rateability of the property for which he was assessed, which was tythe rents and compositions under an inclosure act; it is not enough for the parish officers to shew that he was in the receipt of such rents (assuming the property to be rateable), of the probable amount of which, as rated, they gave no evidence. *R.* v. *Topham.* 12 E. R. 546

POOR (Relief of).

1. When relief is granted to a poor person, *only* such person (and not any of the rest of the family) is obliged to go into the workhouse, under statute 9 *G.* 1. c. 7. s. 4. *R.* v. *Haigh.* 3 T. R. 637 (And see Poor (Settlement) III. 24.)
2. Where an allowance is ordered to be paid weekly to a pauper, it is due at the beginning of the week.
R. v. *J. Fearnley.* 1 T. R. 320
3. Giving parish relief to a pauper within the parish is no evidence of his settlement there. In the instance in question the relief was administered at one time for a fortnight, and at another time for a longer period, in the parish workhouse.
R. v. *Inhab. of Chatham.* 8 E. R. 498
4. Under stat. 9 *G.* 1. c. 7. s. 4. which enables the *churchwardens and overseers, with the consent of the major part of the parishioners,* to contract for the providing for the poor, it is not necessary that *all* the churchwardens and overseers should concur; the contract of a *majority* of them will bind the rest. *R.* v. *Beeston.* 3 T. R. 592
5. The parish to which the principal militia-man belongs is liable to reimburse the parish of the substitute the expenses of maintaining the substitute's family, though the substitute had more than one child when he was approved by the deputy lieutenants and inrolled; which under such circumstances he ought not to have been.
R. v. *Willis.* 6 T. R. 179
6. *Semble,* That if a substitute be sworn and actually served in the militia, his family are entitled to be relieved within the meaning of stats. 26 *G.* 3. c. 107 § 24; 33 *G.* 3. c. 8. § 3. though the substitute were not previously approved by two deputy lieutenants, or inrolled
7 T. R. 558
7. A substitute in the militia falsely declaring at his inrolment that he had no wife or family, when in fact he had a wife and one child, is not entitled to any parochial allowance for their relief under stat. 43 *G.* 3. *c.* 47. § 2. 5.
R. v. *Preston (Inhab.)* 13 E. R. 313
8. A husband is not bound to maintain his wife's child by a former husband.
Tubb v. *Harrison,* 4 T. R. 118; (and see *R.* v. *Munden,* 1 *Stra.* 190. and *Cooper* v. *Martin.* 4 E. R. 76.

POOR (Removal of.)

1. *Who are removable.*

1. One who is resident on an estate granted to him for lives, in consideration of two guineas fine and 1*s.* rent, cannot be removed therefrom, though actually chargeable. But *semble* he cannot gain a settlement by 40 days residence as on *his own* estate under the stat. 9 *G.* 1., the consideration being under 30*l.*
R. v. *Martlet (Inhab.)* 5 E. R. 40
2. A husbandman, who has actually served in the militia, and is married, may be removed to his place of settlement before he becomes chargeable to the parish from which he is removed; for by stat. 26 *G.* 3. c. 107. § 131., only those militia-men, *who exercise any trades,* are irremoveable.
R. v. *Gwenop.* 3 T. R. 133
3. But those who are privileged *morando* are privileged *eundo.* 3 T. R. 133
4. A certificated person cannot be removed under stat 8 & 9 *W.* 3. c. 30. till he is *actually* chargeable.
R. v. *St. Mary Westport.* 3 T. R. 44
5. Therefore a *probability* that one of the certificated persons residing together in one family will become chargeable (as if a female be pregnant with a bastard) is no cause for removing them.
3 T. R. 44
6. But now under stat. 35 *G.* 3. c. 101. § 6., an unmarried woman may be removed to the place of her settlement on account of her being pregnant: even though she be residing under a certificate from her own parish.
R. v. *Gt. Yarm. Parish.* 8 T. R. 68
7. A *single woman* living in service with her master is not removeable even since the stat. 35 *G.* 3. c. 101 § 6. against the consent of herself and her master, though adjudged by the order of removal to be *with child,* and *therefore* chargeable to the parish in which she was serving; that statute not extending to make persons removeable who were not proper objects of removal before, but only to leave certain descriptions of persons excepted out of the act liable to be removed, though not in fact chargeable, if otherwise proper objects of removal.
R. v. *Alveley (Inhab.)* 3 E. R. 563
8. A married woman pregnant in the absence of her husband with a child, which when born would by law be a

bastard, being removeable as an unmarried woman under sect. 6. of stat. 35 G. 3. c. 101, it has been held that the presumption of her being chargeable arises, by the same clause, from the bare fact of being with child of a bastard, if no circumstances be stated to shew that such presumption is not applicable to a person in the particular situation of the party coming within the general description of the clause And the order of removal may charge such a person generally as *actually chargeable*, without setting forth in what manner chargeable.
R. v. *Inhab. of Tibbenham.* 9 E. R. 388

9. An order of removal founded on the stat. 35 G. 3. c. 101. § 6. stating that *A. E. single* woman was "*by being* "*pregnant deemed to have become* "*chargeable*," &c. was held good.
R. v. *Inhab. of Diddlebury.* 9 E.R. 398

10. An order of removal, merely adjudging that the person removed was *with child and unmarried*, without drawing the conclusion that she was *chargeable*, was held bad: as the statute 35 G. 3. c. 101., which first gives the general rule, that no person shall be removed till actually chargeable, and then (§ 6.) says, that an unmarried woman with child shall be deemed to be chargeable within the intent of the act, only makes the fact of such pregnancy presumptive or *primâ facie* evidence of her chargeability; which is open to be rebutted by evidence of her substance or the like; shewing that she was not an object of the poor laws, or that she could secure the parish against the contingent charge of maintaining herself and her bastard. *R.* v. *Holm East Wavering (Inhab.)* 11 E. R. 381

11. *Semble*, a servant cannot be removed out of the service of his master. *R.* v. *Ozleworth Bur. S. C.* 302. 4. *(cited)* 3 E. R. 568, *n.*

12. Where relief was given to a son and grandson, living in a separate house from the father, it was held to be no ground to remove him and his other children living with him; but that part of the family only which was chargeable was removeable. 3 T. R. 44
(And see POOR (RELIEF) I.)

13. An order of justices, removing nurse children to their derivative settlement without taking notice of the death or settlement of the parents, is good.
R. v. *Bucklebury (Inhab.)* 1 T.R. 164

14. The evidence of the father in such case may be dispensed with, where his attendance cannot be procured.
1 T. R. 146

15. A labourer employed by his master to drive a cart into his parish with one load, and to return with another, and who broke his leg there by accident, which detained him for some time in such parish, by which he was relieved, is to be considered as *casual poor*, and as such, is not removeable either under the stat. 13 & 14 *Car.* 2, *c.* 12. or the stat. 35 *G.* 3, *c.* 101, as not coming there *to settle* or *inhabit*; and consequently the expenses of his relief cannot be directed to be paid during the suspension of the order of removal under the latter statute. *R.* v. *St. James's in Bury St. Edm.* 10 E. R. 25

II. *Orders of Removal.*

1. An order of removal only prohibits the party thereby removed from returning again in a state of vagrancy to the same parish.
R. v. *Fillongley (Inhab.)* 2 T.R. 711

2. An order of removal may be executed a year after it is signed, if the pauper's circumstances be not altered in the interval.
R. v. *Llanwinio (Inhab.)* 4 T. R. 473

3. If two justices take the examination of a pauper relative to his settlement, but do not remove him, and the pauper afterwards die or become insane, whether two other justices may remove his family on it? *Qu.*
R. v. *Eriswell (Inhab.)* 3 T. R. 707

4. An alteration is an order of removal by one justice in the presence of the other, before it is delivered to the parish officers, does not vitiate it.
4 T. R. 473

5. The Quarter Sessions can only amend an order of removal as to mere defects or want of form under stat 5 *G.* 2, c. 19. 8 T. R. 181

6. Where two countries have been mentioned in the antecedent part of an order of removal, the justices making the order must state themselves to be justices of the proper county; and it is not enough to describe themselves justices of the peace in and for the *said county*, although the proper county were named in the margin, and were also named last before such description of the justices. *R.* v. *Moor Critchell, (Inhab.)* 2 E. R. 66

7. An order of justices removing "*M. F. wife* of *P. F. a Scothman*, who never gained a settlement in *England*," and their children, to the place of *her* last legal settlement, which order was stated on the face of it to be made *on examination of the husband*, and *with the consent of him and his wife*, was holden good.
R. v. *Eltham (Inhab.)* 5 E. R. 113

8. An order of justices for removing the wife and daughters of a panper to the place of their settlement, is supported *primâ facie*, by showing that the parish to which the removal was made was the place of the wife's settlement before her marriage; and throws the burthen of proof on the appellants that the husband was settled in another parish. *R.* v. *Harberton (Inhab.)* 13 E. R. 311

9. An order of removal, directed to "the *parish of Poole*, or *town and county of Poole*," is sufficient; though the proper name of the parish be *St. James in Poole;* there being no other parish in the town and county of *Poole*.
R. v. *Topsham (Inhab.)* 7 E. R. 466

10. Under the stat. 35 *G.* 3. *c.* 101. § 2. an order of justices, suspending their order made for the removal of a pauper to his place of settlement, on account of sickness, may be made, though he were not *brought before the justices* at the time of such orders made: the plain intent and precise object of the statute being to extend the power of suspension to all cases where orders of removal may be made: and orders of removal may be made though the paupers to be removed be not brought personally before the magistrates; however fit that is to be done where it may be done.
R. v. *Everdon (Inhab.)* 9 E. R. 101

11. Where husband, wife, and children are removed by order of justices, which order was suspended as to the husband till his recovery from illness, the wife and children were removed on his death without any order to remove the suspension; this is no reason for the sessions to quash the first order on appeal, nor to quash an order for payment of the charges of such suspension.
R. v. *Englefield (Inhab.)* 13 E. R. 317

III. *When conclusive; and of Appeal against, &c.*

1. Where the Quarter Sessions are holden at two different places in the county, the one being an adjournment only from the other, and an order of removal is executed after the beginning of the original sessions but before the adjourned sessions, an appeal at the next ensuing adjourned sessions, is in time and ought to be received.
R. v. *Justices of Sussex.* 7 T. R. 107

2. An appeal against an order of removal may be entered at the next sessions but one after the order is executed, if there be not time between the execution of the order and the next sessions to make inquiries respecting the pauper's settlement.
R. v. *Justices of Flintshire.* 7 T. R. 200

3. If an order of removal be executed three days before the sessions in a parish 20 miles from the place where the sessions are holden, and there is no appeal to those sessions, the justices are not bound to receive an appeal at the following sessions. *R.* v. *Justices of Herefordshire.* 3 T. R. 504

4. The Sessions refused to receive *and adjourn* the hearing of an appeal next sessions, thinking the appellant had sufficient time to be prepared to try it, and to give notice to the respondents. *R.* v. *Justices of Yorkshire North Riding.* 3 T. R. 150

5. But the foregoing case has been decided not to be law; for if upon an appeal lodged against an order of removal, the Sessions are of opinion that reasonable notice has not been given by the appellant to the respondent parish, they cannot dismiss the appeal, on the ground that notice might have been given in time, but are bound by the direction of the stat. 9 *G.* 1. *c.* 7. § 8. to adjourn the appeal to the next Sessions. *R.* v. *Buckinghamshire (Inhab.)* 3 E. R. 342

6. And the justices are bound by stat. 9 *G.* 1. *c.* 7. § 8. to receive and adjourn an appeal made by the next Sessions after an order of removal made, against such order, if no notice have been given to the respondent; though they should be of opinion that the order was executed in sufficient time before the Sessions to have enabled the appellants to give reasonable notice of their appeal to the respondents. *R.* v. *Justices of Staffordshire.* 7 E. R. 549

7. Where an appeal against an order of removal had been entered and adjourned once by virtue of the statute 9 *G.* 1. *c.* 7. § 8.; though the justices in Sessions have a discretionary power to determine whether reasonable notice has been given of the appellant's intention to proceed on the trial of such adjourned appeal; yet as they dismissed the appeal at such adjourned Sessions, without hearing it, on the ground that they had no authority to try it for want of a sufficient length of notice to the respondents, according to a new rule of practice promulgated two sessions before, but then first acted upon, and which was not known to the appellant's attorney, who had given the former usual notice: the Court of K. B. granted a mandamus to the Sessions to enter continuances and hear the appeal.
R. v. *Just. of Wiltshire.* 10 E. R. 404
8. The justices are to judge of the reasonableness of the time. 3 T. R. 150
9. An order of removal quashed for form is not conclusive on the parties.
R. v. *St. Andrew, Holborn.* 6 T.R. 613
10. An order of removal unappealed from is conclusive, not only on the parties removed, but also as to all derivative settlements under them.
R. v. *S. Mary, Lambeth.* 6 T. R. 615
11. Therefore if *A.* and *B.* be removed as man and wife from *X.* to *Y.*, and there be no appeal against the order, it is conclusive not only as to *A.* and *B.*, though they be not married, but also as to their children though illegitimate. 6. T. R. 615
(See *R.* v. *South Ockram.* 1 T. R. 353.)
12. The parish, in whose favour an order of removal is made, may by consent abandon it, without waiting to appeal to the Sessions, and having it quashed there. And after such order cancelled by the removing magistrates, with the consent of both parishes before the time of appeal, another order made by them, removing the pauper to a different parish, was held good.
R. v. *Diddlebury (Inhab.)* 12 E.R. 359
13. If a feme covert be removed by an order of two justices from *A.* to *B.*, describing her as "widow," and there be no appeal against it, it is conclusive not only as to her settlement, but as to that of her husband also.
R. v. *Rudgeley (Inhab.)* 8 T. R. 620
14. An order of removal of *J. S.* and his wife, made upon the examination of the wife, adjudging that they *lately* came into the parish of *K.*, and *are* likely to become chargeable to it, and were last legally settled in *M.*, is good and conclusive upon the parish of *M.* as to the marriage and settlement of the husband and wife: so that upon the subsequent removal of the wife describing her as *B. S.*, single woman from *M.* to *B.*, *M.* cannot shew in evidence that the marriage was null and void.
R. v. *Binegar (Inhab.)* 7 E. R. 377
15. After an order of removal unappealed from, a new settlement can only be gained by some act altogether subsequent to the removal.
R. v. *Kenilworth (Inhab.)* 2 T. R. 598
16. An order of removal, executed and unappealed against, is conclusive as to the settlement of the pauper at the time of such order, even as between third parishes no parties to the former order.
R. v. *Corsham (Inhab.)* 11 E. R. 388
17. On an appeal to the Sessions against an order of removal, those justices, who are rated to the relief of the poor in either of the contending parishes cannot vote.
R. v. *Yarpole (Inhab.)* 4 T. R. 71
18. If an order of removal be, on appeal, confirmed by a majority of the justices present, and it be afterwards determined, on a question reserved for the opinion of the Court of K. B., that so many of them were disabled to vote as to reduce the number to a minority, the Court will not quash the original order, but will send the case back to the Sessions, directing them to enter a continuance to the next Sessions, in order that they may quash it. 4 T. R. 71
19. If an order of removal be confirmed at the Sessions, and both orders be afterwards removed into *B. R.* by *certiorari* on a case reserved, and this court disapprove of the orders, for want of jurisdiction of the removing magistrates appearing on the face of the original order; this court will quash both the orders, without remitting the matter back to the Sessions to quash the original order for the purpose of enabling them to give maintenance according to stat. 9 *G.* 1. *c.* 7. § 9. and at any rate they will not admit an application for amending their

judgment for quashing both orders made in the term subsequent to the judgment so pronounced. *R.* v. *Moor Critchell. (Inhab.)* 2 E. R. 222

20. By the stat. 35 *G.* 3. *c.* 101. § 2. the party aggrieved by an order of justices, directing payment, to the amount of above 20*l.* of the charges and costs of the suspension of an order of removal, on account of the illness of the pauper, may appeal to the next Sessions, in like manner as against an order of removal, though he omit to give notice of such his appeal within three days after the demand of such charges and costs; by which he makes himself liable to a distress for the amount. And if on appeal the former order be vacated, or the amount of the charges to be paid be reduced, the surplus, if before levied by distress, must be refunded.

R. v. *Bradford (Inhab.)* 9 E. R. 97

21. Coupling the stat. 35 *G.* 3. *c.* 101 (which enables two justices to suspend orders of removal on account of the sickness of the paupers, and to give the costs of such suspension with an appeal against such costs if they amount to 10*l.*) with the stat. 3 *W.* & *M. c.* 11. § 9. (which gives an appeal to the party *grieved* by any determination of the justices respecting the settlements of paupers by the means there mentioned); Appeals lie against an order of removal which was suspended, and against a subsequent order for costs, notwithstanding the death of the pauper, before any removal of him in fact made, and though the costs were under 10*l.*, such order for costs attaching by consequence a *grievance* on the parish to which the order of removal was made, if the pauper was not settled in it. *R.* v. *St. Mary-la-bonne (Inhab.)* 13 E. R. 51

POOR (SETTLEMENT OF).

I. *By Apprenticeship. (And of Parish Apprentices, their Indentures,* &c.)

1. A person occupying lands within a parish, is compellable to receive a parish apprentice, though he do not reside within such parish.

R. v. *Clapp.* 3 T. R. 107

2. And if several persons hold lands in partnership, in the parish of *A.*, some of whom reside on such lands, and the others in another parish, the latter, as well as the former are liable to take parish apprentices in *A.*

R. v. *J. Barwick.* 7 T. R. 33

3. So, although it is enacted by stat. 20 *G.* 3. *c.* 36. relative to the binding of poor apprentices within particular incorporated districts, that no person shall be bound to receive any such apprentice, unless he be an inhabitant and occupier in the parish where such child lives, it is not necessary that the master should actually reside in the parish: if he be an occupier there it is sufficient; for *inhabitant* and *occupier* are, for this purpose, synonimous terms. *R.* v. *Tunstead and Happing Hundreds.* 3 T. R. 523

4. An indenture of a parish apprentice assented to by two justices *separately* is void, and gives no settlement. *R.* v. *Hamstall Ridgware.* 3 T. R. 380: (And see title JUSTICES I. 6— 10.)

5. But the assent of two magistrates is sufficiently signified by one of them first signing alone and being afterwards present when the other signs.

R. v. *Winwick (Inhab.)* 8 T. R. 454

6. If a poor boy be bound apprentice by the parish officers, with the consent of two justices of the county to a master residing in a different parish and county, and all the parties (except the apprentice) sign the indenture, the apprentice will gain a settlement in the parish of the master by residing there 40 days under the indenture. *R.* v. *St. Nicholas, Nottingham.* 2 T. R. 726

7. An indenture binding out a poor apprentice, executed by *W. S.* churchwarden, and *J. G.* overseer of the poor of a hamlet maintaining its own poor separately from the parish at large, not being impeached by evidence negativing its execution by a majority of the churchwardens and overseers of the hamlet, shall be deemed good, by intending that there were two overseers for the hamlet as required by stat. 13 & 14 *Car.* 2. *c.* 12. § 21., and only *one* churchwarden, *by custom*, in the same place; and therefore the apprentice serving 40 days under it gains a settlement.

R. v. *Hinckley (Inhab.)* 12 E. R. 361

8. The stat. 43 *Eliz. c.* 2. § 1. enacting that the *churchwardens* of every parish, and four, three or two substantial *householders* there, to be nominated by the magistrates, shall be *overseers of the poor*, requires an appointment to be made of *two such overseers* at the least, *exclusive* of the existing churchwardens; which body so constituted, or the greater part of them, are em-

powered to execute certain duties relating to the poor: and therefore the 5th section, which authorizes "*the said churchwardens and overseers, or the greater part of them,*" (by the assent of two justices) to bind out poor children apprentices, is not satisfied by a compulsory binding by two persons styling themselves *churchwardens* and *overseers*, who had been appointed the overseers of the parish at a time when one of them was *churchwarden;* which latter continued sole churchwarden for about two months afterwards, when the other overseer was appointed sole churchwarden in his place: for at all events this power is given to a body constituted of more than two persons, though it may be executed by the major part of the body when well constituted: and therefore, a poor child assumed to be bound apprentice by such an indenture could not gain a settlement by service under it. *R.* v. *All Saints', Derby (Inhab.)* 13 E. R. 143

9. Service under indentures of apprenticeship, not stamped, gives no settlement. *R.* v. *Edgworth.* 3 T. R. 353: (And see 4 T. R. 218; and *post* II. 10)

10. Nor does service under an unstamped agreement of apprenticeship. *R.* v. *Ditchingham (Inhab.)* 4 T. R. 769

11. An agreement for the assignment of an apprentice from one master to another must also be stamped by stat. 23 *G.* 3. *c.* 58. 6 T. R. 452

12. Where a sum agreed to be given with an apprentice was five guineas, which was inserted in the indenture, and the duty paid accordingly, by stat. 8 *Ann, c.* 9; held well, though in fact only four guineas were paid; for the *full sum received, given, paid, agreed, or contracted for,* as required by the act, was inserted, and the duty paid for it; and the stamp used was of the same description, and the duty appropriated to the same fund, as if four guineas only had been inserted and paid for, supposing that would have sufficed.

R. v. *Keynsham (Inhab.)* 5 E. R. 309

13. Money given by the parish officers, in the case of a voluntary binding, as the consideration of taking an apprentice, is not liable to the stamp duty imposed by stat. 8 *Ann, c.* 9. § 35. for it comes within the exception to it, as being *at the public charge of the parish.* 4 T. R. 196

14. Neither is any duty payable for any consideration-money under § 35. of that act, (or thing actually given or contracted to be given under § 45.) unless it be given to, or to the use of, the master or mistress of the apprentice. 4 T. R. 196. 732

15. If the friends of an apprentice covenant to maintain him, and to provide him with clothes, this is not such a benefit as is liable to the duty imposed by stat. 8 *Ann, c.* 9. § 45.

R. v. *Leighton (Inhab.)* 4 T. R. 732

16. And consequently a settlement may be gained by serving 40 days under an indenture of apprenticeship, containing such a covenant, although no additional duty be paid for it. 4 T. R. 732

17. A master stipulating for 4*d.* out of every 1*s.* of the earnings of his apprentice is no benefit to him within the stat. of *Anne,* for which an additional duty is to be paid, being by law entitled to the whole.

R. v. *Wantage, (Inhab.)* 1 E. R. 601

18. Where the apprentice covenanted in the indentures to provide for himself meat, drink, lodging, and physic in sickness, during the term, for which benefit to the master no additional duty was paid under stat. 8 *Ann. c.* 9. § 45. the indentures were nevertheless held good, and a settlement was gained under them; it not appearing whether certain weekly payments, which the master covenanted to make to the apprentice during the term, were not an equivalent. *R.* v. *Walton in Le Dale.* 3 T. R. 515

19. If *A.* serve seven years as an apprentice, and there be no indenture, he cannot gain a settlement either as an apprentice or as a yearly servant.

R. v. *Margram (Inhab.)* 5 T. R. 153

20. It is a general rule that a defective contract of apprenticeship cannot be converted into a contract of hiring and service, so as to give the apprentice a settlement as a yearly servant by serving under it. Whether a contract be a contract of apprenticeship, or of hiring and service, must depend on the intention of the parties, which is to be collected from the whole of their agreement. A contract of apprenticeship may be formed without using the term "apprentice."

R. v. *Laindon (Inhab.)* 8 T. R. 379

21. Where a pauper agreed with a weaver to serve him for a year and a half

and the master was *to teach him to weave*, and the pauper was to have half his earnings, and find himself in every thing; under which contract the pauper served his master for above a year: held, that he thereby gained a settlement as by hiring and service; it being the apparent intention of the parties to create the relation of master and *servant*, and not that of master and *apprentice*.
R. v. *Eccleston (Inhab.)* 2 E. R. 298

22. Where the master and the father of a boy agreed, under seal, that the master should teach the son the art and mystery of weaving for five years, and find utensils, and that the son should receive half his earning, and the master the other half; under which the boy served out the time as an apprentice: the Court of K. B. held that this agreement between the father and master (to which the son was no party) not binding the son, or the father for him, to any service to the master, but the son's service in fact being merely voluntary, was no apprenticeship in point of law; and consequently no settlement could be gained by the son serving his master under such a contract. *R.* v. *Cromford (Inhab.)* 8 E. R. 25

23. To establish a settlement by apprenticeship it was proved that the indenture was of two parts, that one had been destroyed, that the other had come to the hands of *A.*, who, when asked for it, said he could not find it, but *A.* was not subpœnaed to give evidedce; and upon that ground the evidence offered was deemed insufficient to establish the apprenticehip.
R. v. *Castleton (Inhab.)* 6 T. R. 236

24. The sessions upon an appeal presuming that an indenture of apprenticeship executed thirty years before (under which the pauper claimed his settlement, and under which he regularly served seven years), and which was proved to be lost, was regularly stamped, in proportion to the apprentice-fee received by the master with the pauper, confirmed an order removing the pauper; and though it was proved before the Sessions that search had been made at the Stamp-Office, where it did not appear that any such indenture had been stamped or enrolled, yet the Court of K. B. held that this was not sufficient to rebut the presumption, and therefore confirmed the order of Sessions *R.* v. *Long Buckby (Inhab.)* 7 E. R. 45

25. Serving forty days under an indenture of apprenticeship to an infant will give a settlement. *R.* v. *St. Petrox, Dartmouth.* 4 T. R. 196

26. The latter part of the service of an apprentice may be joined to the former, notwithstanding an intervening service. 1 T. R. 281

27. If an apprentice live with his master forty days in *A.*, then forty days in *B.*, and then one day in *A.*, he is settled in *A.* *R.* v. *Brighthelmstone (Inhab.)* 5 T. R. 188

28. An apprentice to a ship-owner living at *A.* gains a settlement by residing on board his master's ship for forty days in *B.*, while the ship was staying and trading there in the course of his master's trade and employ, upon a coasting voyage. And if the apprentice afterwards, upon the bankruptcy of his master, return to *A.*, where he formerly resided with his master as at his home, and finding that his master had absconded, live there with a relation, without doing any further service there for his master; such residence, though for more than forty days before his apprenticeship expired, will not gain him a settlement in *A.*
R. v. *Topsham (Inhab.)* 7 E. R. 466

29. An apprentice cannot gain a settlement in a different parish by serving another master, unless there be an express consent of the original master to the particular service: a mere recommendation is not sufficient.
R. v. *Sandford.* 1 T. R. 281; & 6 T. R. 452; (and see *post* III. 21—25.)

30. So the mere *knowledge* of the master of the apprentice serving another peson, without a consent to the particular individual, is not sufficient. 3 T. R. 605

31. If the agreement between the first and second master, expressing such consent, cannot be rece.ved in evidence of the agreement ought not to be admitted.
R. v. *St. Paul's, Bedford.* 6 T. R. 452

32. Where a master, after giving his apprentice leave to get another master, *recommended to him to go to a particular person* in the same business, and make an agreement with him *for his own good*, which he accordingly did, and served his second master two months before his indentures were

given up to him by his first master, such service with the second master gained a settlement. *R.* v. *Holy Trinity in the Minories.* 5 T. R. 605

33. An apprentice agreed verbally with his master to purchase the rest of his time, and that the indentures should remain with the ma ter till payment of the time he served another man at the recommendation of his original master above 40 days: this was holden to enure as a service under the indentures. *R.* v. *Chipping, Warden* (*Inhab.*) 8 T. R. 108

34. Where there has been such an agreement between the master and the apprentice to give up the indentures, as that to an action of covenant brought by the former, the latter could plead the matter in bar; or so as to enable the apprentice to bring *trover* or detinue for the indentures on the master's refusing to deliver them up; the indentures are considered as cancelled, for the purpose of enabling the apprentice to gain a settlement by hiring and service, though the indentures still subsist in fact.

R. v. *Harberton.* 1 T. R. 139

35. But when indentures of apprenticeship still subsit in point of law, and the pauper has served another master under an idea that they were relinquished, no settlement is gained by such service, either as an apprentice, or as an hired servant.

R. v. *Sundford.* 1 T. R. 281

36. A parish apprentice who was bound by her original master to another master by a new indenture of apprenticeship, without reference to or recognition of the original indenture, which still subsisted in law, does not gain a settlement by serving her new master, as upon a constructive service of the original master under the first indenture: this being only evidence of the first master's consent to the contract of apprenticeship.

R. v. *Christowe* (*Inhab.*) 11 E. R. 95

37. Where the master of an apprentice told him "that he had no further employment for him, and he might go where he pleased;" and the apprentice hearing of another master, was going to him, and being met by his original master, and asked where he was going, answered that he was going to *U.*. to which the master replied, "*he might go there or where he pleased;*" held, this was not such a particular assent of the original master to the service with *U.* as would enable the apprentice thereby to gain a settlement, though the indentures were not delivered up or cancelled.

R. v. *Crediton* (*Inhab.*) 1 E. R. 59

38. An apprentice offered his master a guinea "to let him off," to which the master agreed, and was also to give him a suit of clothes when the guinea was paid, but the indentures were not delivered up or cancelled. The guinea not being paid, the indentures still subsisted in law, and a settlement may be gained by serving another master with the consent of the first. The sessions ought properly to find the fact of such consent, and not merely evidence of it: but having found that on application by the apprentice to his original master for leave to serve one *B.*, who would not take him without the master said "he might go with all his heart, and that it would be a good thing for him to learn the trade:" this was holden sufficient evidence to warrant the conclusion of the sessions, that the original master had consented to the particular service.

R. v. *Shebbear* (*Inhab.*) 1 E. R. 73

39. The pauper, an apprentice, being about to marry, told his master that he wished to provide and work for himself, to which the master consented, and said he might do the best he could for himself; but nothing was said about the indentures, and they were not in fact delivered up or cancelled; the pauper afterwards engaged to work with another master, who told the original master, that he had got the pauper at work, to which the original master answered, "I am glad of it, he was a bad lad, and I could make nothing of him:" held, this was not such a consent to the particular service as would confer a settlement in the parish where the pauper then lived with the second master. *R.* v *St. Helen Stonegate,* (*Inhab.*) 1 E. R. 285

40. A contract under seal and stamped, to serve another for three years, at so much *per* week, the master agreeing to learn the other a trade, and the latter agreeing, if he lost any time to the prejudice of his master, to abate so much *per* day, constitutes an apprenticeship. And at any rate the pauper

having served under it for more than a year gained a settlement either as an apprentice or as a hired servant.
R. v. *Rainham*, (*Inhab.*) 1 E. R. 531

41. Supposing an infant, who binds himself an apprentice, may put an end to the apprenticeship at his election, yet he does not put an end to it by leaving his master's service and entering into the king's service. *R.* v. *Hindringham* (*Inhab.*) 6 T. R. 557

42. In such a case the indentures continue in force for the term, and no settlement can be gained during that term by hiring and service. 6 T. R. 557

43. Whether an infant can put an end to the apprenticeship, it being a contract for his benefit! *Qu.* 6 T. R. 558; and *Ashcroft* v. *Bertles*. 6 T. R. 652

22. An indenture binding an adult as an apprentice, which was not executed by herself, but only by her father-in-law and the master, though with her consent, does not constitute her an apprentice; and consequently no settlement can be gained by her under such indenture.
R. v. *Ripon* (*Inhab.*) 9 E. R. 295

II. *By Birth, or Derivative.*

1. The place of birth is *primâ facie* the place of settlement. *R.* v. *Heaton Norris* (*Inhab.*) 6 T. R. 653

2. The Sessions having decided in favour of a settlement in *A.* by which the pauper's father was proved to have been *relieved while resident in another parish* 40 years ago, and before the pauper's birth; and the only evidence to oppose this being that of the pauper's own birth in *B.* the Court of K. B. confirmed the order of Sessions on a case reserved.
R. v. *Wakefield.* (*Inhab.*) 5 E. R. 335

3. Where a certificate was granted to a pauper *and his wife*, which latter appeared afterwards to have had a former husband living at the time, and a child was born during the cohabitation of the pauper and his supposed wife in the certificated parish, and was baptized as their child; this was held sufficient evidence of bastardy to settle the child where born.
R. v. *Lubbenham* (*Inhab.*) 4 T. R. 251
(And see *post* III. 28.)

4. The settlement of a child five years old, leaving the father's family, and living with different relations till ten, follows that of the father; if he has not gained any settlement in his own right. *R.* v. *Offchurch.* 3 T. R. 114

5. A child is not emancipated so as to lose the benefit of any settlement which his father may gain, till 21, or marriage, or till he has gained a settlement in his own right, or till he has contracted a relation inconsistent with the idea of his being part of his father's family. *R.* v. *Witton cum Twanbrookes.* 3 T. R. 355

6. A son, of age, and married, continuing to live with his father, does not follow a settlement subsequently acquired by the father in another parish, to which the son also accompanied him as part in fact of his household.
R. v. *Everton* (*Inhab.*) 1 E. R. 526

7. A drummer, under age, entered into the same militia in which his father was serjeant, and lived with his father, the latter receiving the son's pay: held, that a settlement gained by the father during such time was communicated to the son.
R. v. *Woburn* (*Inhab.*) 8 T. R. 479

8. An adult who leaves her father's house, and goes into service, becomes thereby emancipated, and is not entitled to a settlement gained afterwards by the father.
R. v. *Roach* (*Inhab.*) 6 T. R. 247

9. A widower having a daughter, placed her at 11 years of age with an uncle, by whom she was wholly maintained after that time, and with whom she continued to reside after she came of age, doing service to him, but without any contract of hiring to give her a settlement of her own; the father in the meantime having gone out to service. Held that on her coming of age she was emancipated, although her father conceived himself bound, as such, to receive and support her if she left her uncle's: and consequently the father was capable of gaining a settlement by hiring and service for a year, as "an unmarried man, *not having a child*," (*i. e.* not having a child who would follow his settlement) within the stat. 3 *W. & M. c.* 11. § 7.
R. v. *Cowhoneyborne* (*Inhab.*) 10 E. R. 88

10. A son, sixteen years old, was bound apprentice in *A.* for four years, which he served, and never afterwards returned to his father's family; the indenture was void for want of a stamp, and the father in the meantime gained

a settlement at *B.*; held, that the son was not settled in *A.* by the apprenticeship, and that he was not emancipated, but followed his father's settlement at *B.* R. v. *Edgenorth.* 3 T.R. 353 and see 4 T. R. 218

11. Proof of the father's settlement i sufficient to establish the settlement of the son in the same parish, if nothing appear to contradict it.
R. v. *Stone* (*Inhab.*) 6 T. R. 56

12. The settlement of a person attainted, acquired before the attainder, is communicated to his children born afterwards. *R.* v. *St. Mary, Cardigan.* (*Inhab.*) 6 T. R. 116

13. A settlement gained by a *Scotchman* some years after his son was emancipated by having left his family and enlisted in the army, is not communicated to the son; and it is immaterial whether the son had gained a settlement for himself or not.
R. v. *Stanwix* (*Inhab.*) 5 T.R. 670

III. *By or under Certificate.*

1. A certificate given to a pauper is an indemnity to the parish to which the pauper is going, from the consequences of permitting him to reside there.
R. v. *Newington* (*Inhab.*) 1 T. R. 356

2. An allowance of a certificate of a settlement, as having been duly executed, written in the margin of the certificate, and signed by two justices, is alone sufficient proof of the certificate, where such certificate is above thirty years old, notwithstanding the allowance does not certify the affidavit of one of the witnesses as to the due execution and attestation of the certificate according to stat. 3 *G.* 2. *c.* 29.
R. v. *Farringdon* (*Inhab*) 2 T.R. 466

3. *Qu.* Whether an allowance of a certificate written in the margin and signed by two justices, which allowance does not certify any affidavit made by one of the witnesses according to stat. 3 *G.* 2. *c.* 29. can be connected with a writing on the other side of the same paper, not signed by the justices, certifying that such an affidavit was made, so as to amount to proof of such certificate within the provisions of stat. 3 *G.* 2. *c.* 29. 2 T. R. 466

4. The parties producing, on an appeal at the Sessions, a parish certificate of 30 years' date, need not give any account of it; the bare production of it is sufficient.
R. v. *Ryton* (*Inhab.*) 5 T. R. 259

5. A certificate, promising to receive the paupers when *requested*, means only when they shall be *legally* requested, namely, by two justices when the paupers become chargeable. 3 T.R. 44

6. If it meant to receive them before they became chargeable, it would be void under the stat. 8 & 9 *W.* 3. *c* 30.; for a certificate is only binding when it is conformable to that statute.
3 T. R. 44

7. A certificate must be signed by a majority of the parish officers *de facto*, and must be directed to one parish in particular.
R. v. *Wymondham* (*Inhab.*) 6 T. R. 552

8. But it has since been held, that a certificate directed to the parish of *A.* or any other in *C.* will operate upon delivery to the parish of *B.* which is also in *C.*; and that by the stat. 8 & 9 *W.* 3. *c.* 30. a certificate need not be directed to any particular parish.
R. v. *Lillington.* 1 E. R. 438

9. An appointment of one overseer alone for a township is bad in law; the statute 13 & 14 *Car.* 2. *c.* 12. requiring at least two; and a certificate granted by such overseer is void, and gives no security to the certificated parish against the gaining of a settlement there by the party named therein; such certificate not being made pursuant to the stat. 8 & 9 *W.* 3. *c.* 30., which requires it to be made "by the churchwardens and overseers, or the major part, or by the *overseers*, where there are no churchwardens."
R. v. *Clifton* (*Inhab.*) 2 E.R. 168

10. Where one of two *churchwardens* was also appointed *overseer* of the poor, a certificate of a settlement signed by both is a nullity, and does not prevent an apprentice, serving the certificated man in the certificated parish, from gaining a settlement therein: for the certificate act 8 & 9 *W.* 3. *c.* 30. requires the certificate to be under the hands and seals of the churchwardens *and overseers*, or the major part of them, or of the overseers where there are no churchwardens; and there must be at least two overseers at the time.
R. v. *St. Margaret, Leicester* (*Inhab.*) 8 E. R. 332

11. On a settlement case the court will not inquire into the validity of the titles of the officers who signed the certificate. 6 T. R. 552

12. An order of removal, adjudging that the pauper was settled at *A. by virtue*

of a certificate, was confirmed at the sessions on the merits; on its being stated by the Sessions, according to direction from the court, that the certificate was not signed by a majority of the churchwardens and overseers of *A.*, this court quashed the orders.'

R. v. *Morgan*. 1 T. R. 775

13. The parish of *A.* consisted of several hamlets, having separate churchwardens and overseers; and a certificate having been granted by some of them, describing themselves as officers of *the parish at large*, evidence was admitted to shew that they were the officers of the *hamlet* in which the pauper was settled; for such evidence does not contradict, it only explains the certificate.

R. v. *Samborn*. 3 T. R. 609

14. A certificate granted under stat. 8 & 9 *W.* 3. *c.* 30. to the head of a family in general, extends to all his children living with him.

R. v. *Storrington* (*Inhab.*) 7 T.R. 136
And see 4 T. R. 797

15. But if the parties wish it, it may be so framed as to exclude a son of the age of fourteen, who maintains himself by his own labour. 7 T. R. 136

16 Such certificate does not extend to illegitimate children.

R. v. *Mathon* (*Inhab.*) 7 T. R. 361

17. Nor to grandchildren; the word *family* extends only to those who live under the father's roof.

R. v. *Darlington* (*Inhab.*) 4 T.R. 797

18. Where the parish officers of *A.* engaged by a certificate to receive the certificated person, therein stated to be an unmarried woman, and the child of which she was stated to be then pregnant, and all other children she might afterward have, it was ruled that the certificate did not extend to an illegitimate child born several years afterwards. 7 T. R. 362

19. If a certificate be granted to *A.* and to *B.*, *C.*, and *D.*, his children, by name, *B.*'s residence in the certificated parish is protected by it, although he afterwards marry and live separate from his father, not having gained any settlement or lived out of the certificated parish.

R. v. *Testerton* (*Inhab.*) 5 T. R. 258

20. So under a certificate granted to *A.* and to *B.* and *C.* his children by name, the residence of *B. and of his family* in the certificated parish is protected by it, and a son of *B.* (not having been emancipated) cannot gain a settlement in the certificated parish by hiring and service.

R. v. *Batheaston.* (*Inhab.*) 8 T. R. 446

21. When the son of a certificated person marries and lives in a house of his own, he ceases to be under the protection of the certificate, and may gain a settlement in the certificated parish by being rated.

R. v. *Heath* (*Inhab.*) 5 T. R. 583

22. Where the son of a certificated person (not named in the certificate otherwise than under the general appellation of the father's *family*) marries and lives in a house of his own in the certificated parish, he ceases to be under the protection of the certificate as part of his father's family; and an apprentice may gain a settlement by serving such person in the certificated parish.

R. v. *Mortlake* (*Inhab.*) 6 E. R. 397
(And see *post* V. 55,)

23. A certificate extends to a wife married after it is granted; and no apprentice to such wife, after the husband's death can gain a settlement in the certificated parish by stat. 12 *Ann.* stat. 1. *c.* 18.

R. v. *Hampton* (*Inhab.*) 5 T. R. 266

24. The son of a certificated person cannot gain a settlement in the certificated parish by apprenticeship, though the father (to whom the certificate was given) died six months before the expiration of the apprenticeship.

R. v. *Alfreton* (*Inhab.*) 7 T.R. 471

25. The apprentice to a master, living at *A.* who has a certificate from *B.*, but not delivered to the parish officers of *A.* may gain a settlement by such apprenticeship.

R. v. *Weasley* (*Inhab.*) 5 T.R. 154

26. If an apprentice to a certificated person be assigned to a second master in the same parish, he cannot gain a settlement in that parish by serving the second master.

R. v. *Hinckley* (*Inhab.*) 4 T. R. 371

27. A certificate granted by the parish of *A.* to the parish of *B.* acknowledging *C.* and *D.* *his wife* and their children to be their parishioners, is conclusive as between *A.* and *B*, though *D.* were not the legal wife of *C.*

R. v. *Ulleskorpe* (*Inhab.*) 8 T. R. 465

28. But such certificate is only *primâ facie* evidence as to others; and therefore where the parish of *A.* granted a certificate to the parish of *B.* acknowledging the pauper and his wife to be

their parishioners, it was held to be competent to *A.* as between that parish and *C.* to shew that the woman supposed to be the pauper's wife had a former husband living, at the time of her marriage with the pauper.
R. v. *Lubbenham* (*Inhab.*) 4 T.R. 251

29. A second certificate to a pauper discharges a former one given by the same parish.
R. v. *St. Peter, Derby.* 1 T.R. 218

30. If a parish are desirous to get rid of a certificate, it is incumbent on them to shew clearly some matter in discharge thereof; and the court will not *presume* such discharge from other facts. *R.* v. *Warblington.* 1 T.R. 241

31. A temporary absence for a particular purpose will not discharge a certificate. 1 T.R. 356.—(See *post* 37, 38.)

32. But if the pauper quit the parish to which the certificate is given without any intention of returning, the certificate is at an end. 1 T. R. 356

33. If a person, formerly settled at *A*, receive a certificate from that parish while living on his own estate at *B.*, the certificate is discharged by his subsequent residence on his estate at *B.*
R. v. *Ufton.* 3 T. R. 251
(See *post* IV. 3.)

34. The infant son of a person living at *A.* under a certificate, served a year at *B.* (an extra-parochial place) under a yearly hiring, and then returned to *A.* under twenty one, where he was hired and served a year; it was held that he gained no settlement in *A.*
R. v. *Collingbourne-Ducis* (*Inhab.*) 4 T. R. 199

35. Where the son of a certificated person served a year under a yearly contract in the parish granting the certificate, and then returned under age to the father's house for a short time, and then served another year with another master under a yearly hiring in the certificated parish, held that he did not gain a settlement in the latter parish. *R.* v. *Ingworth* (*Inhab*) 8 T R. 339

36. Whether a certificate be abandoned by the head of the family returning to the certifying parish, leaving his children in the parish to which the certificate is granted? *Qu.*
4 T. R. 800, 801

37. A certificate is not abandoned by a temporary absence of the certificated person; as where he goes to another parish on a visit, or on occasional business. *R.* v. *St Michael's, Coventry* (*Inhab.*) 5 T. R. 528

38. But where he leaves the certificated parish with all his family, and takes up his residence in another parish, it is abandoned, though he again return to the certificated parish, after an interval of two years. *ib.*

39. All the parishes in *Norwich* are consolidated by act of parliament for the purpose of maintaining their poor out of one joint fund, but as far as respects strangers they are distinct parishes: therefore a certificate granted to the parish of *A.* in *Norwich* is discharged by the certificated person serving a year under a yearly hiring in the parish of *B.* in *Norwich*, though the certificating parish engage to receive the pauper when he shall become chargeable either to *A.* or to any other parish in *Norwich.*
6 T. R. 552

40. The mutiny act enables two justices to take the examination of a soldier respecting his settlement, and directs them to give an attested copy of it to the soldier to be by him delivered to the commanding officer in order to be produced when required, and makes such attested copy evidence; it was held that no other attested copy of the original examination than that given to the soldier is evidence.
R v. *Clayton-le-Moors.* 5 T. R. 704

41. *Qu.* Whether such an original examination be admissible as evidence?
5 T. R. 707, 708

42. It was held so to be.
R. v. *Warley* (*Inhab.*) 6 T. R. 534
(But see EVIDENCE VI. 7, 8.)

IV. *By Estate.*

(And see POOR (REMOVAL) I. 1.)

1. Residence on an *equitable* estate will confer a settlement.—(See *post* 4.)
3 T. R. 117

2. A voluntary gift of an estate, though under the value of 30*l.* will give a settlement, and this whether the donee be a certificated man or not. 1 T.R. 241

3. A certificated man may gain a settlement by residing forty days on his own estate. 1 T. R. 241
R. v. *Cold Ashton Bur. S. C.*
1 T. R. 450

4. A husband may gain a settlement by residing on an estate vested in trustees for the separate use of his wife.
R. v. *Offchurch.* 3 T. R. 114

5. A pauper having a freehold estate in the parish of *A.*, in the occupation of a tenant to whom he had let it, was

deemed to gain a settlement by residing thereon 40 days with the licence of his tenant for making some repairs; such residence being considered as equivalent to a residence in any other part of the parish. *R.* v. *Houghton le Spring (Inhab.)* 1 E. R. 247

6. A cottage leased for 99 years, determinable on lives, purchased by the pauper's wife before marriage, was in the lifetime of her first husband conveyed by them to a trustee in trust that he should by sale or mortgage raise 10*l.* (for the benefit of the parish by whom the family had been before relieved to that amount), interest and charges and after payment of the same, in trust to re-assign the premises: the parties always continued in possession; and it did not appear whether the money was ever paid, or what was the value of the cottage. Held that on the death of the first husband, the pauper who married the widow gained a settlement by residing forty days in the cottage, of which she had retained the possession.

R v. *Edington* (*Inhab.*) 1 E. R. 288

7. While the pauper resided in the parish of *B.*, a freehold estate descended to his wife and her sisters, as coparceners, in the same parish; and in a month after, the pauper and his wife contracted to sell their share, but the conveyance was not actually executed for more than forty days after their title accrued: held that the pauper was thereby settled in *B.*, although the estate during all the time was in the occupation of another.

R. v. *Dorstone* (*Inhab.*) 1 E. R. 296

8. Where a pauper purchased a leasehold tenement for less than 30*l.*, and afterwards conveyed the whole term to one, in trust to let the premises, and out of the rents and profits to repay himself 10*l.* advanced thereon, and then to apply the rents and profits to the separate use of the pauper's wife during her life, and afterwards to the pauper's own use for life if he survived her, and afterwards amongst their children: and the trustees suffered the pauper to continue to reside in the house above forty days, till becoming chargeable to the parish he was removed; held, that he gained no settlement by such residence; for he had no immediate interest remaining in him at the time, but at a most doubtful and contingent future interest; it being uncertain whether the 10*l.* would ever be paid off, and even if it were, that not giving him any right to reside upon the premises. *R.* v. *Tarrant Launceston* (*Inhab.*) 3 E. R. 226

9. Where a woman, on her marriage, with a copyholder of a manor, in which the widows of husbands dying seised are entitled to their free-bench, gave a bond that the son of her intended husband by a former wife should have possession of part of the copyhold estate after the death of her husband, on condition of his repairing the part of the house reserved for her, and after the death of the husband the widow delivered up the possession to the son, according to the bond, he gained a settlement by residing on it forty days.

R. v. *Lopen* (*Inhab.*) 2 T. R. 577

10. The mortgagee of several houses, after recovering possession in ejectment, permitted the mortgagor to inhabit one of them *for a particular purpose;* the latter gained no settlement by such residence, for he was not in possession *as mortgagor.*

R. v. *Catherington* (*Inhab.*) 3 T. R. 771

11. If *A.* residing on a cottage of his own, grant it by lease and release to *B.* in fee, in consideration of 36*l.* with a proviso "that *A.* shall live in, *and occupy* the said cottage with the appurtenances, as he had theretofore done, for life;" *B.* only takes a remainder after an estate for life in *A.*, and therefore has not such an interest during *A.*'s life as will enable him to gain a settlement by a residence on the estate.

R. v. *Eatington* (*Inhab.*) 4 T. R. 177

12. *Secus* if there had not been the word "occupy" in the proviso. *Semble. ib.*

13. The word "occupy" reserved the whole estate. *ib.*

14. The executor of a tenant from year to year of an estate under 10*l.* a year may gain a settlement by residing on it forty days, though he had not proved the will at the time.

R. v. *Stone* (*Inhab.*) 6 T. R. 295

15. A guardian in socage, residing on the ward's estate for forty days, gains a settlement in the parish; and cannot be removed from the possession of it at any time.

R. v. *Oakley* (*Inhab.*) 10 E. R. 491

16. A *sole* next of kin has such an equitable interest in a leasehold tenement of the intestate, that she gains a set-

flement by residing forty days in the same parish after the intestate's death, before administration granted to her. And it matters not that the widow of the intestate survived him, if she died afterwards without having taken out letters of administration, leaving the other sole next of kin to the intestate. But no settlement is gained by the mere relation back to the death of the intestate of the letters of administration when granted, taken out only 18 days before the next of kin parted with her interest in the leasehold; so as to connect a residence of those 18 days with a residence by such next of kin in the same parish for more than forty days, after the deaths of the intestate and his widow, before such administration granted.

R. v. *Horsley* (*Inhab.*) 8 E. R. 405

17. Where an estate has been enjoyed nearly twenty years without any interruption or claim, the court will not permit the title to the possession to be examined in a settlement case.

R. v. *Butterton* (*Inhab.*) 6 T. R. 554

18. Where the pauper's father, upon his marriage, obtained from his father-in-law, a spot of ground, though without any conveyance, upon which he built a house, and enjoyed it during his life, and it afterwards descended to his eldest son, who enjoyed it also (in the whole near twenty years), without any interruption or claim from the donor or his heirs; it was held that the younger children of the person who built the house could not be removed from that parish. 6 T. R. 554

19. *A.* agreed to give a cottage to his grandson on his marriage, but there was no conveyance; the grandson entered, fitted it it up at his own expense, and lived in it several years; then the grandfather died intestate, leaving an only child (the mother of the grandson) who never entered on the cottage, or received or demanded any rent for it: afterwards the mother died, leaving a husband and an only son (the above-named grandson): it was held that the husband was not tenant by the courtesy; that the son (the above-named grandson) was seised in fee; and consequently that he gained a settlement by residing on it forty days.

R. v. *Great Farringdon* (*Inhab.*) 6 T. R. 679

20. There must be a seisin in fact in the wife, in order to make her husband tenant by the courtesy. 6 T. R. 679

21. A conveyance from a father to his son in consideration of *natural love and affection and of* 10*l.* is not a purchase within the stat. 9 *G.* 1. *c.* 7., and a residence upon it will give a settlement. *R.* v. *Ufton.* 3 T. R. 251

22. *Purchase* in that statute means for a "pecuniary consideration." 3 T. R. 251

23. Where the consideration expressed in the deed of conveyance was 28*l.*, under which the pauper claimed his settlement, *parol* evidence was admitted to prove that 30*l.* was the real consideration.

R. v. *Scammonden.* 3 T. R. 474

24. Taking a grant of a copyhold with 1*s.* fine, 1*s.* heriot, and 1*s.* rent, is a purchase within the stat. 9 *G.* 1.

R. v. *Warblington.* 1 T. R. 241

25. Where *A.* contracted for the purchase of a copyhold estate for 39*l.*, mortgaged to another person for 32*l.*, and paid 7*l.*, and was admitted to the estate, subject to the mortgage, he did not gain a settlement by it under that state. *R.* v. *Mattingley* (*Inhab.*) 2 T. R. 12

26. *A.* agreed to purchase a copyhold estate of *B.* for 60*l.*, which was then mortgaged to *C.* for 50*l.*; he paid the 10*l.* and was admitted, subject to the mortgage interest in *C.*; afterwards he borrowed 50*l.* of *D.* to pay off *C.*'s mortgage, and on *C.*'s mortgage being satisfied, he mortgaged the estate to *D.* for 50*l.*; it was held that *A.* gained a settlement by residing forty days on the estate.

R. v. *Chailey* (*Inhab.*) 6 T. R. 755

V. *By Hiring and Service.*

(And see *ante* I.)

1. Hiring and service from the day after old *Martinmas-day* until the old *Martinmas-day* following, is sufficient to give a settlement.

R. v. *Skipland.* 1 T. R. 490

2. Under a hiring from *Whitsuntide* to *Whitsuntide*, a service of 365 days, though less than the period of the contract in the particular year, is sufficient to confer a settlement.

R. v. *Ulverstone* (*Inhab.*) 7 T. R. 564

3. A hiring three days after *Michaelmas till* the *Michaelmas* following in leap-year, together with a service till the day after *Michaelmas-day*, making 365 days, will not give a settlement.

R. v. *Ackley.* 3 T. R. 250

4. A statute fair being held yearly on the day after old *Michaelmas*, except when old *Michaelmas* falls on a *Saturday*, and then the fair being held on

the *Monday*; held that a hiring from such *Monday* till old *Michaelmas-day* following is not a yearly hiring under which a settlement can be obtained. *R.* v. *Standon Massey* (*Inhab.*) 10 E.R. 576

5. An hiring at so much *per* week is not an implied hiring for a year.
R. v. *Newton Toney*. 2 T. R. 453: —and *R.* v. *Odiham*. 2 T. R. 622

6. A hiring at so much a week for as long a time as the master and servant could agree, is only a weekly hiring, under which no settlement can be gained.
R. v. *Mitcham* (*Inhab*) 12 E. R. 351

7. If there be any thing in the contract to shew that the hiring was intended to be for a year, there a reservation of weekly wages will not control that hiring. 2 T. R. 453

8. But if the payment of weekly wages be the only circumstance from which the duration of the contract is to be collected, it must be taken to be only a weekly hiring. 2 T. R. 453

9. A hiring at so much a week, meat, drink, washing, and lodging, and to part on a week's notice by either party, will not warrant a conclusion of a general hiring; though the servant continued six years with the master, and the wages were raised during the period: and therefore no settlement can be gained under such hiring and service.
R. v. *Hanbury* (*Inhab.*) 2 E. R. 423

10. Where nothing is said in a contract of hiring about time but a reservation of *weekly* wages, it is a *weekly hiring* only. Therefore, where the contract was for the servant to live with his master, the latter finding him board and lodging, and *paying him* 2*s.* 6*d per week*, no settlement could be gained by service for more than a year under such contract.
R. v. *Pucklechurch* (*Inhab.*) 5 E.R. 33

11. Service for a week under an hiring "at 3*s. per* week the year round," with liberty to go on a fortnight's notice, will give a settlement.
R. v. *Birdbrooke* (*Inhab.*) 4 T. R. 245

12. A hiring to serve for 3*s.* 9*d. per* week, with the liberty of parting on a month's notice, is a general hiring; and the pauper serving a year under it gains a settlement.
R. v. *Hampreston* (*Inhab.*) 5 T.R. 205

13. A service under a hiring by the week (the servant boarding and lodging himself), nothing being said about Sunday, but the servant working on that day occasionally, when asked by his master, without additional wages, though he sometimes received victuals, may be joined with service under a yearly hiring as a menial servant, so as to confer a settlement by hiring and service for a year.
R. v. *Sutton* (*Inhab.*) 1 E. R. 656

14. An agreement by a daughter to live with her father and to do the offices of a servant for a year for her board and lodging and other perquisites, is a good hiring for a year, though the daughter is to be at liberty to earn what she can by her labour, and a service under it will be sufficient to gain a settlement.
R. v. *Chertsey* (*Inhab.*) 2 T. R. 37

15. The pauper, having lived with his uncle on charity, was afterwards hired as a yearly servant by another person, whom he accordingly served; at the expiration of which he returned to his uncle on an invitation from him, "that if he would come *and live with him as before*, he would make it better for him than a common service;" and lived with him several years in the parish of *A.*, performing the work of a servant in husbandry; during the time he so lived with his uncle, the latter promised that if he continued with him for his life he would leave him his farm and stock, but he received no wages: it was held that he gained no settlement in *A.*
R. v. *Stokesley* (*Inhab.*) 6 T. R. 757

16. The pauper was placed by the parish with a parishioner, who agreed with the parish to find the pauper with board, washing and lodging, at so much *per* week, and the pauper was to do what he was set about. After serving nearly a twelvemonth in this way, the parish refused to continue the payments, and the pauper was sent away by his master, but shortly returned, and served him as before near three years. The pauper went twice a year to *London* to receive a pension: he always told his master he was going, but never asked or received leave from him. Held that this service did not give a settlement in the parish where the master resided, for there was no contract as between master and servant. *R.* v. *Rickinghall Inferior* (*Inhab.*) 7 E. R. 373

17. A poor boy sent out of the house of industry at 14 years of age to the

parish officers, and by them *allotted* to a parishioner, who handed him over to another person, by whom the boy was told that he was to stay with them a year, and should have clothes, &c., to which the boy made no objection, conceiving himself obliged to accept the service, but made no agreement for wages, or concerning the nature or duration of his service, nor was consulted upon the subject, does not gain a settlement by serving under this supposed obligation for a year; for neither did he consider himself, nor was he considered by the other parties, as a free agent; and such only can contract, or adopt a contract made by others.

R. v. *Stow-Market* (*Inhab.*) 9 E. R. 211

18. *A.* went into the service of *B.* without making any terms at the time; a few days afterwards *B.* agreed to find *A.* in meat, drink, and clothes, but no money; *A.* continued in the service two years and a half, when she was dismissed by *B.*; held that this was a general hiring, and that it conferred a settlement on *A.*

R. v. *Warfield* (*Inhab.*) 5 T. R. 506

19. The pauper came to an inn at the request of the waiter, who was ill, to help him, and continued there boarding and lodging for nineteen months; and the waiter went away in thirteen months; after which the pauper continued to serve in the same manner as he had done before, without making any agreement at all with the master, though the master knew of his being in the service the second day: it was held that he did not gain a settlement by such service, because there was no hiring for a year either express or implied. He could only be considered as the servant of the master for the last six months.

R. v. *St. Matt. Ipswich.* 3 T. R. 449

20. Service under a hiring for seven years, to work only thirteen hours in the day, and *Sundays* excepted, will not give a settlement. The servant must be under the control of the master for the whole year. *R.* v. *Kingswinford* (*Inhab.*) 4 T. R. 219

21. A pensioner of the East India Company, hiring himself as a servant for a year, with a reservation to himself, of two days in each half year, when he might go for his pension, cannot gain a settlement by service under such a contract. *R.* v. *Over* (*Inhab.*) 1 E. R. 599

22. A service under a hiring for five years as a colt-shearman, to work twelve hours each day, will not give a settlement.

R. v. *North Nibley.* 5 T. R. 21

23. Under a contract of hiring as a bleacher and crofter for a year at 12*s.* a week, the servant continuing to work under such a contract for a year gained a settlement in the parish where he resided, although by the practice of the manufactory in which he was engaged, if he finished his appointed week's work, calculated at so many pieces a day for *six* days, in less time, he had the rest of the week to do as he pleased, and he also went where he chose on *Sundays*, without asking leave: for this is an express contract for a year, without any express exception.

R. v. *Horwick* (*Inhab.*) 10 E. R. 489

24. *A. clubbed* with *B.* for three years, (which signifies one person contracting to serve another for the purpose of being taught some art or trade), and *also agreed to do any work* that *B.* set him about; held that *A.* gained a settlement by serving *B.* under this contract for a year.

R. v. *Coltishall* (*Inhab.*) 5 T. R. 193

25. *A. clubbed* with *B.* for three years, at a certain rate of weekly wages, with a *proviso* that if he were prevented from working by bad weather, illness, or want of employment, there should be a proportionable deduction of wages: held that *A.* gained a settlement by serving a year under this hiring, though occasional deductions on these accounts were made.

R. v. *Martham* (*Inhab.*) 1 E. R. 239

26. If a husbandman serve for a year, it is strong evidence from which the justices at the Sessions may presume that he served under a yearly hiring.

R. v. *Lyth* (*Inhab.*) 5 T. R. 327

27. So where a servant had lived three years in service with the same master, held that it was evidence from which the justices might infer a yearly hiring, though it appeared that at first the servant was only hired for part of a year. *R.* v. *Long Whatton.* 5 T. R. 447

28. So if a servant, after serving a year, part of which was under a retrospective hiring, so that no settlement could be gained under it, continue in service part of another year, the justices may presume a hiring for a second year.

R. v. *Hales* (*Inhab.*) 5 T. R. 668

29. A settlement may be gained by serving a year under different hirings, if one of them be for a year, though there be not forty days' service under the yearly hiring.

R. v. *Adson* (*Inhab.*) 5 T. R. 98

30. If a servant be hired from *November* to *Michaelmas* following, and before *Michaelmas-day* his master offer to hire him from *Michaelmas* for a year at certain wages, to which he does not agree but remains in the house till the second day after *Michaelmas*, working as usual, and then accepts the offer, and serves a part of the year; the service under the latter hiring commences on the *Michaelmas-day*, and may be coupled with the former service so as to give a settlement. *R.* v. *Sulgrave*. 1 T. R. 778

31. The servant, having been hired for and served eleven months for ten guineas, was told by his master, at the expiration of that time that "he might stay on an end," without mentioning the wages, to which the servant assented; the second agreement was held to be a general hiring, and the party serving a year under it, gained a settlement.

R. v. *Macclesfield*. 3 T. R. 76

32. A retrospective hiring will not give a settlement.

R. v. *Marton* (*Inhab.*) 4 T. R. 257

33. No settlement is gained by a hiring and service for less than a year, though the master tell the servant at the time of the hiring, that he shall not belong to the parish, and the Sessions state such contracts to be fraudulent.

R. v. *Mursley*. 1 T. R. 691

34. If a master and servant before *Michaelmas* agree for yearly wages, and the master while he is taking money from his pocket to give earnest, tells him that *he shall be absent a fortnight at* Michaelmas *because of his settlement*, and that he will *give* him that time to get what he can, to which the servant assents; this is a mere dispensation of the service for that time, and not such an exception out of the original contract as will make the hiring insufficient for the purpose of gaining a settlement.

R. v. *Sulgrave* (*Inhab.*) 2 T. R. 376

35. The servant's apprehending that his master would not have hired him if he had not agreed to the fortnight's absence, will not alter the case.

2 T. R. 376:—and see 455

(As to dispensing with service or dissolving the contract, see tit. SESSIONS.)

36. A *bonâ fide* exception of part of the time at the time of hiring will prevent a settlement, but if there be no exception, then a permissive absence afterwards will not prevent it. 2 T. R. 379

37. No settlement can be gained by serving under a contract of hiring for four years, with liberty for the servant to leave for a week every year to see his friends; for that is to be taken distributively, *i. e.* reserving a week out of each year.

R. v. *Rushulme* (*Inhab.*) 10 E. R. 325

38. Absence at the beginning, the middle, or the end of the year, may be dispensed with, either with the consent of the master, or for an excusable cause. *R.* v. *East Shefford*. 4 T. R. 806

39. And a settlement was gained, though the pauper ran away without leave, was brought back by a justice's warrant after thirteen weeks' absence, and then consented to have a deduction made out of his wages for that time.

4 T. R. 806

40. Absence can only be purged where the act itself is doubtful. 1 T. R. 101

41. Where the master insisted on turning away his servant, and threw down his wages, which the other took up and then went away, and after the expiration of six days, returned at the *master's request*, and served the remainder of the year, the absence was not purged by the subsequent return.

R. v. *Gresham*. 1 T. R. 101

42. The servant, a few days before the end of the year for which he was hired, went away in order to get another place for the next year, without asking his master's consent; on his return, before the end of the year, the master insisted on turning him away, and offered him his wages up to that time, which he accepted without making any objection; this was held to be a dissolution of the contract, and defeated the settlement, though the servant *wished* to stay out the year.

R. v. *Clayhydon* (*Inhab.*) 4 T. R. 100

43. A yearly servant, being deprived of his reason forty days before the end of the year, was taken home by his father, who lived in another parish, and who received the wages for the whole year; held that the servant was settled in the master's parish, though he continued in his father's house during the remainder of the year.

R. v. *Sutton* (*Inhab.*) 5 T. R. 657

44. But where on account of illness the apprentice resided with the consent of his master, with a relation, in another parish, and slept there for more than forty nights in the whole, but the last night in his master's parish: held that this was not such a residence *as an apprentice*, so as to gain him a settlement in the parish where he so resided on account of illness.
R. v. *Barmby (Inhab.)* 7 E. R. 381

45. An apprentice who went to lodge at his mother's, in an adjoining parish to that of his master's, for the purpose of getting cured of a disorder, but who continued to serve his master all the time, by going of errands for him, and attending when wanted, gains a settlement by such service in the parish where he lodged. *R.* v. *Stratford-upon-Avon (Inhab.)* 11 E. R. 176

46. If a yearly servant be discharged four or five days before the end of the year on his master's becoming a bankrupt, and receive the full year's wages, the service is sufficient to give him a settlement. *R.* v. *St. Andrew, Holborn.* 2 T. R. 627

47. A master being obliged to leave his house seven days before the end of a year for which he had hired a servant, told the latter that he had no further occasion for her services, and paid her the whole year's wages; the master would otherwise have kept her, and she was unwilling to leave the service: —Held, a dispensation of the service for the rest of the year; and the service sufficient to give a settlement.
R. v. *St. Mary, Lambeth (Inhab.)* 8 T. R. 236

48. If there be not a voluntary agreement between the parties, and the master *fraudulently* turn away the servant with a view of preventing his gaining a settlement, or *wrongfully* discharge him before the end of the year, that will not defeat the servant's settlement. *(Dictum.)* 2 T. R. 626

49. But where a servant, who was ill-treated and turned out of doors by his master three days before the end of the year, refused (on his master's request the next day) to return into the service, it was held that he did not gain a settlement by his service, though his master paid him his wages for the whole year. *R.* v. *Grantham.* 3 T. R. 754
R. v. *Corsham.* 2 E. R. 303

50. And where a servant who had been hired for a year was beaten by her master sixteen days before the end of the year, on which she desired him to dismiss her from his service, threatening to apply to a magistrate for redress, the master paid her the whole year's wages, and told her she might serve the remainder of the year but the servant went away; it was held that she gained no settlement.
R. v. *Upwell (Inhab.)* 7 T. R. 438

51. If a servant hired for a year give warning eight days before the expiration of the year, to leave his master at the end of the year, and the master discharge him on the same day, paying him his full wages, the servant being willing to stay till the end of the year, the contract is not thereby dissolved so as to prevent the servant's gaining a settlement, but the discharge is merely a dispensation with the remainder of the service. *R.* v. *St. Philip in Birmingham.* 2 T. R. 624

52. Where the master died three weeks after hiring the pauper for a year the latter, abiding in the service with the widow and sons to the end of the year, gains a settlement in the parish where she served. And it is no less an abiding in the service for a year, because one of the sons, on a frivolous pretence, turned her out of doors three weeks before the end of the year, she being willing and offering to stay to the end of the year, but carried away her clothes the next day, and taking what the son insisted was her full wages for the year according to the agreement, though she demanded a larger sum as her full wages.
R. v. *Hardham-with-Newton (Inhab.)* 12 E. R. 51

53. A servant, eleven weeks before the end of his year, on a quarrel with his master, applied for his *discharge*; which his master refused, unless the servant could get another man to stand in his stead; the servant accordingly procured another, to whom he gave money for the purpose out of his own pocket, in addition to the wages which the new man was to receive from the master; and the servant then left the service, and hired himself as a day-labourer for the remainder of the year: held that this was proper evidence from whence the Sessions might draw the conclusion of a dissolution of the contract; though it was encountered by the evidence of the servant, that his master said to

him at the time, that if the other man did otherwise than well, he could send for the servant, and make him serve out his time; to which the latter assented: which account was, in the judgment of the Sessions, impeached by the master's having no recollection of having so said, and saying that he had not any *intention* to have the servant back, they having parted on bad terms; which latter expression the Court received, not *as evidence* per se of the master's *intention*, but only *as a reason* assigned by him, why he was not likely to have said what the servant stated. *R.* v. *Mildenhall* (*Inhab.*) 12 E. R. 482

54. *A.* was hired at *Martinmas* to serve in husbandry for a year, at the wages of 8*l.*; in the middle of the year he married, and then agreed to serve his master as a hind, for a year from that time, at the wages of 5*s.* *per* week, and he was to live out of his master's family, but at another farm, in the same parish, belonging to his master: it was held, that the former agreement was dissolved by the latter, and that *A.* did not gain a settlement by serving under those contracts. *R.* v. *Great Chilton* (*Inhab.*) 5 T. R. 672

55. A yearly servant three weeks before the end of his year hired himself to a second master, provided his first would let him go; the former master refused at first, but a week after he said "I have got a new servant, you may go now, I have not work for you both;" and paid him his whole year's wages: held, that this was a dissolution of the contract with the first master, and prevented the pauper's gaining a settlement under it.

R. v. *Thistleton* (*Inhab.*) 6 T. R. 185

56. When before the end of the year the mistress asked the servant whether she chose to go away on a certain day (within the year), assigning as a reason that she had hired a new servant who wished to come to her then, and the servant said it was immaterial to her, and agreed to go then, which she did: the Court of K. B. thought that was evidence sufficient to find an agreement to dissolve the contract before the end of the year. *R.* v. *St. Peter, Mancroft, Norwich* (*Inhab.*) 8 T. R. 477

57. A servant, who had been hired for a year, was taken ill five days before the end of the year, on which he went to his brother's, and sent to his master for his money; the latter sent him the whole year's wages, deducting 1*s.* for the rest of the year, and the servant said he was satisfied: it was held that this was an agreement by the master and servant to put an end to the contract before the end of the year, and consequently that the servant gained no settlement.

R. v. *Whittlebury* (*Inhab.*) 6 T. R. 464

58. A servant hired for a year, four months before the end of the year, being discharged by her master upon a trivial dispute, applied to a magistrate for redress, being desirous of continuing in the service. The magistrate ordered the master to take her back, or pay the whole year's wages; the master refused to take her back, but paid the whole year's wages, (but not some wool which he also had agreed to give her if she behaved well). The servant took the money, and tendered herself as a servant to others: held, that the contract was thereby dissolved and no settlement gained under it, as in case of a mere dispensation of service. *R.* v. *King's Pyon* (*Inhab.*) 4 E. R. 351

59. Five days before the end of the year a servant absented himself by leave one day from his master's service to look out for another place; and on his return the master on some trivial pretence said he should not stay any longer in his service, and offered him a trifle less than his whole wages, which the servant refused; but was then ready to have accepted his whole wages; though he would rather have staid out his year: and immediately he applied to a magistrate to oblige his master either to pay him the whole or to receive him into his service for the remainder of the year; when the magistrate ordered half-a-crown to be deducted; and the servant thereupon *hired himself to another master, before his first year was out;* and, after the year received from his first master his whole wages. The Court of K. B. held that this was a *dissolution* of the contract before the end of the year by mutual consent, signified on the part of the servant by his entering into another service.

R. v. *Leigh* (*Inhab.*) 7 E. R. 539

60. A yearly servant, about a fortnight before his year expired, being too ill to work, his master paid him his *whole* year's wages, when he *left the service*,

and went to an hospital, and never returned into his master's service: held a dissolution of the contract; and that no settlement was gained by such hiring and service.

R. v. *Sudbrook (Inhab.)* 4 E. R. 356

61. The pauper desired her mother to look out for a place for her; and the mistress, on the application of the mother some time before *Old Michaelmas*, said she would give the pauper the same wages as her other servants, and wait till she came; but the mother made no absolute agreement for her daughter; though she informed her that she had got a place for her if she liked it. About *a week after Old Michaelmas*, the mistress applied to the pauper to know if she liked to come into her service, and they then agreed for the first time for certain yearly wages, (the same as the other servants), *with liberty of parting at a month's wages or warning*. The Court of K. B. held, that the hiring commenced only from the day when the pauper and her mistress agreed on the terms specified, and not from *Old Michaelmas*, or before, when the mother spoke to the mistress. And the pauper having given a month's previous notice to quit *at Old Michaelmas-day;* which the mistress accepted, and procured another servant to come on that day; when the pauper received her whole year's wages; but upon the mistress telling her that she wanted a week of serving out her year, she offered to stay another week; to which the mistress said that it did not signify as she had got another servant in her place: held, that this was a *dissolution* of the contract before the end of the year, by the notice to quit given and accepted; and not a mere *dispensation* of the service; and consequently no settlement was gained by such hiring and service.

R. v. *Rushall (Inhab.)* 7 E. R. 471

62. The Sessions stated the fact that the pauper was hired on *Michaelmas* day, 10th of *Oct.* 1797, for a year ending on *Michaelmas* day, 10th *Oct.* 1798; that he continued to serve till the 8th of *October*, when he married, and *his master consented to his leaving his service*, and paid him his wages; and on the 9th the pauper hired himself to and went into the service of another master: held by one judge, that these facts would have warranted the Sessions in drawing a conclusion of fact, that the master dispensed with the service for the remaining day of the year; but the Sessions having impliedly drawn a different conclusion by quashing the order of removal, all the Court held that the case, as stated, shewed a dissolution of the contract before the end of the year, and consequently that no settlement could be gained by such hiring and service.

R. v. *Maidstone (Inhab.)* 12 E. R. 550

63. If a servant be unmarried at the time when he is hired for a year, he gains a settlement by a year's service, though he marry before the service commences. *R.* v. *Allendale & R.* v. *Stannington.* 3 T. R. 385

64. A widower, having a son who has no settlement of his own, is prevented by stat. *W. & M. c.* 11. § 7., from gaining a settlement by hiring and service for a year, though the son be hired for a year on the same day when the father is hired, and serve that year. *R.* v. *New Forest (Inhab)* 5 T. R. 478

65. A deserter from the King's marine service cannot gain a settlement under a hiring and service for a year: not being *sui juris*, nor competent *lawfully* to *hire* himself within the stat. 3 *W. & M. c.* 11. § 7. *R.* v. *Norton, juxta Kempsey (Inhab.)* 9 E. R. 206

66. If a pauper in service at *A.* under a yearly hiring be removed to *B.* and does not appeal, but returns in a few days to his master at *A.*, is received by him, serves out the year, and receives his full wages, yet he gains no settlement in *A.* 2 T. R. 598

67. The order of removal in that case put an end to the service. 2 T. R. 598

68. A yearly servant served forty days in *A.*, then forty days in *B.*, and afterwards returned to his father's house in *A.*, for the three last days of the year: held that he was settled in *A.* *R.* v. *Under Milbeck (Inhab.)* 5 T. R. 387

69. A person cannot gain a settlement by hiring and service with the son of a certificated man continuing to reside in the certificated parish with his mother after the father's death, as part of her family; though the son were of age, and carried on business for himself; such circumstances not amounting to an emancipation.

R. v. *Sowerby (Inhab.)* 2 E. R. 276

VI. *By serving an Office.*

1. A settlement was gained by serving the office of hog-ringer for the parish; it being stated that the pauper was chosen and sworn in at a court-leet: and that it was an office of great antiquity, and serviceable to the parish.
R. v. *Whittlelesea* (*Inhab.*) 4 T.R. 807
2. A settlement may be gained by serving the office of tithingman. 4 T. R. 808
3. Or that of borsholder. *ib.*
4. Or that of ale-taster. *ib.*
5. Or that of hayward. *ib.*
6. The Sessions finding that the pauper was legally appointed governor of the workhouse in *I.* at an annual salary, and that the office of governor is a public annual office, and that the pauper served it for a year; held, that a settlement was thereby gained in *I.*
R. v. *Ilminster* (*Inhab.*) 1 E. R. 83
7. But it should seem that the authority of the foregoing case is much shaken, if not entirely overturned, by the following, where it was held that the master of a workhouse appointed under 9 *G.* 1. *c.* 7. is not *a public annual office or charge* within the stat. 3 *W.* & *M.* *c.* 11. § 6. the executing of which for a year will confer a settlement.
R. v. *Mersham* (*Inhab.*) 7 E. R. 167
8. A curate officiating in a parish for above a year, under the bishop's licence to perform the *office* of curate, at a certain annual stipend, is yet not such an annual *officer* as is entitled to gain a settlement by virtue of the stat. 3 *W.* 3. c. 11. § 6.
R. v. *Wantage* (*Inhab.*) 2 E. R. 65
9. If a churchyard lie in two parishes, the sexton may gain a settlement in the one in which he resides, although no part of the church lie within that parish. *R.* v. *Liverpool.* 3 T. R. 118
10. *A.*, who at an adjournment of a court-leet holden 16th *November* 1792, was appointed to an annual office "for a year or until he should be discharged," and who executed the office until the adjournment of another court-leet holden 1st *November* 1793, did not thereby gain a settlement.
R. v. *Bow* (*Inhab.*) 8 T. R. 445

VII. *By being rated to, and Payment of Rates.*

1. A person gains a settlement by being rated and paying the poor rate, though the rate be not regularly made or allowed. 6 T. R. 543
2. Whether the landlord or tenant be rated to the land-tax, (both names being in the rate,) is a question of fact which must be found by the justices at Sessions; and if they state it as a fact, this court is precluded from considering whether they have drawn a right conclusion, though they state all the other circumstances of the case.
R. v. *Folkstone.* 3 T.R. 505: 5 T.R. 240
3. If they only state the evidence of that fact, this court will send the case down to be re-stated.
R. v. *Rainham (Inhab.)* 5 T. R. 240
4. Where the farm was rated, and the landlord paid the rate, and was allowed it by the tenant, the tenant did not gain a settlement, it being stated that the overseer did not know that the tenant resided there. *R.* v. *Llangammarch* (*Inhab.*) 2 T. R. 628
5. For though where a *house* is rated, it is *prima facie* a rate on the occupier, it is not conclusive. 2 T. R. 628
6. A settlement by being rated and paying rates cannot be proved by evidence of paying only, without the production of the rate, or accounting reasonably for the non-production of it; although the payer was both owner and occupier of the estate for which he paid the rate.
R. v. *Coppul* (*Inhab.*) 2 E. R. 25
7. An exciseman who was rated for his salary, which was in fact paid by the collector, without any deduction from the salary, does not thereby gain a settlement.
R. v. *Weobley* (*Inhab.*) 2 E. R. 68
8. A custom-house officer who was rated for his salary towards the land-tax, and in fact paid the rate himself, though the money was either given to him beforehand for the purpose, or allowed to him afterwards by the collector, gains a settlement in the parish in which he is so rated and pays.
R. v. *Axmouth,* (*Inhab.*) 8 E. R. 383
9. The pauper being duly rated and having absconded, his landlord desired the collectors to levy a distress on his goods, lest *he* (the landlord) *should lose the money*; in consequence of which they went to the house, where the pauper's daughter said a friend of her father would assist them; they then went to this friend, who gave a guinea to the collectors; who *thereout received the tax;* this was held payment of the rate by the pauper.
R. v. *Bridgwater.* 3 T. R. 550

10. By stat. 10. Ann. *c.* 6. the parishes in *Norwich* are incorporated for the purpose of maintaining the poor out of one joint fund; but as far as respects strangers, those parishes continue separate and distinct: therefore, a person who resides in one parish in *N.* and is rated in another, gains no settlement in either. *R.* v. *St. Michael's Thorn* in *Norwich.* 6 T. R. 536

11. The town and parish of *Birmingham* is, for the convenience of the overseers, divided into twelve divisions under the superintendance of so many overseers respectively, each of whom copies the names, out of the general rates into a separate book, of such of the inhabitants assessed as are within his district; and it is usual for each overseer to add such names to his book as ought to be inserted in the general rate; such addition is not in fact made till the next year, but in the mean while the general rate is from time to time ordered to be collected with the additions: it was held that a person paying the rate, whose name is *afterwards* added in the overseers' book, does not thereby gain a settlement. *R.* v. *Edgbaston (Inhab.)* 6 T. R. 540

12. *Aliter*, if his name be added *before* he pays the rate. 6 T. R. 540

13. The stat. 35 *G.* 3. *c.* 101. which provides, that after the passing of the act, no person *who shall come* into any parish shall gain a settlement by being rated to any tenement under 10*l.* a-year value, extends to persons who *were* in the parish at the time of the passing of the act. *R.* v. *Islington (Inhab.)* 1 E. R. 288

14. Payment by one who was assessed to a church rate upon *householders* only, and not upon the parishioners at large, will nevertheless gain him a settlement; for it is not less a *public* tax, because laid too narrowly; and it is *charged* and *paid* within the parish, which is all that is required by the stat. 3 *W.* 3. c. 11. § 6. *R.* v. *St. Bees, (Inhab.)* 9. E. R. 203

VIII. *By renting a Tenement.*

1. The fact of the pauper's taking a tenement of 10*l.* a-year is sufficient to give a settlement under stat. 13 & 14 *C.* 2. *c.* 12. though the lessor may have no title. 1 T. R. 358

2. A cattlegate is a *tenement* within that statute so as to enable the occupier of it to gain a settlement: *R.* v. *Whixley.* 1 T. R. 137

3. Taking the hay, grass, and aftermath of a meadow for ten months at the annual value of 10*l.* is a taking of a tenement within that statute. *R.* v. *Stoke (Inhab.)* 2 T. R. 451

4. Renting a dairy will give a settlement. *R.* v. *Piddletrenthide.* 3 T. R. 772

5. So will a rabbit warren, though the party taking it have no interest in the soil, except that of entering upon the warren to kill rabbits. 3 T. R. 772

6. A settlement may be gained by renting the fogs or after-grass of a meadow of the yearly value of 10*l.* *R.* v. *Brampton (Inhab.)* 4 T. R. 348

7. The pauper rented 20 cows at 3*l.* 10*s.* *per annum each*, and agreed with the farmer that they should be fed in particular fields for a certain part of the year, during which time no other cattle were to depasture there; this was held to be a tenement within stat. 13 & 14 *C.* 2. *c.* 12. *R.* v. *Tolpuddle (Inhab.)* 4 T. R. 671

8. Renting a dairy (including the cows and their pasture) at above 10*l.* a-year in value, will not confer a settlement, if the annual value of the *lands* on which the cows were to be depastured were under 10*l.* *R.* v. *Minworth (Inhab.)* 2 E. R. 198

9. One who resided on a tenement of 5*l.* a-year in the parish of *W.* and at the same time rented the ley (i. e. pasturage) of two cows from *Mayday* to *Michaelmas* in certain land in *H.* at six guineas, thereby gains a settlement in *W.*, though he were not entitled to the *exclusive* pasturage of the land in *H.* *R.* v. *Hollington (Inhab.)* 3 E. R. 113

10. Renting the hire or privilege of milking two cows belonging to another, at so much per week, per cow, for 40 weeks; which cows were to be *depastured* by the owner on his farm in common with his other cattle, and were to be milked by the pauper; will gain him a settlement if the pasturage of the cows be worth 10*l.* a-year. *R.* v. *Stoke-upon-Trent (Inhab.)* 10 E. R. 496

11. A settlement may be gained by renting a right of common in gross of the annual value of 10*l.* that being a tenement within stat. 13 & 14 *Car.* 2. *R.* v. *Dersingham (Inhab.)* 7 T. R. 671

12. Where the pauper rented the fishery of a pond with the spear-sedge, flags, and rushes growing in and about the same, for 10*l.* a-year. "the court understood that the soil passed with it,

and that it was a tenement within stat. 9 & 10 *W.* 3. c. 11."

R. v. *Old Alresford.* 1 T. R. 358

13. The renting by a needle-maker of two out of six pointing places in another's mill, any two of which he was at liberty to use from time to time at 16*l.* a-year rent, and engaging also to do all his landlord's work in preference to that of others, for which he was to be paid by the piece, is not the taking of a tenement within the statute so as to gain a settlement by it.

R. v. *Dodderhill* (*Inhab.*) 8 T. R. 449

14. The renting by a needle-maker of certain *runners* in another's mill, together with a packeting-room, of all which he had the exclusive use (a runner being piece of machinery for scouring needles screwed down to the floor of the mill), the whole being of the annual value of above 10*l.* including the separate value of the *runners*, is not in the taking of a *tenement*, whereby a settlement can be gained.

R. v. *Tardibigg* (*Inhab.*) 1 E. R. 528

15. A contract for a *standing place in another's mill* for a carding machine, (the party's own property), which was fastened to the floor and the roof, for the purpose of being worked by the steam engine of the mill; for which the party was to give 20*l.* a-year, with liberty to quit on giving three months' notice, is not a taking of a tenement, but a mere licence to use the machinery of the mill; and therefore no settlement can be derived under it.

R. v. *Mellor* (*Inhab.*) 2 E. R. 189

16. The grazing cattle in a meadow and using a stable and cart-house *gratis*, under an agreement by which the pauper was to pay certain sums weekly for the liberty of grinding wheat at a mill, was held to be no renting of a tenement. *R.* v. *Hammersmith* (*Inhab.*) *H.* 36 *G.* 3. 8 T. R. 450, *n.*

17. A person renting the tolls and residing in the turnpike house erected by order of the commissioners appointed by the stat. 30 *G.* 3. *c.* 67. for paving, lighting, and regulating the streets of *Durham*, and for other local objects, cannot gain a settlement in the parish, on account of the prohibition in § 56 of the General Turnpike Act 13 *G.* 3. *c.* 84. *R.* v. *Elvet* (*Inhab.*) 11 E. R. 93

18. In order so gain a settlement by taking a tenement of 10*l. per annum*, the occupier must reside in the parish where part of the premises lies.

R. v. *Knighton* (*Inhab.*) 2 T. R. 48

19. One may gain a settlement by renting a tenement of above 10*l.* a-year in the parish where he *resided*, though such residence be *in a turnpike house*, as servant to the collector for whom he received the tolls; for the general turnpike acts 13 *G.* 3. c. 84. § 56. only says that "no gate-keeper or person *renting the tolls and residing in the toll-house* shall *thereby* gain a settlement, i. e. by such taking of the toll-house, or renting the toll.

R. v. *Denbigh* (*Inhab.*) 5 E. R. 333

20. A residence for forty days is indispensably necessary to enable a party to gain a settlement by residing on a tenement of 10*l. per annum.* *R.* v. *Llanbedergoch* (*Inhab.*) 7 T. R. 105

21. So that, if a party after residing on such a tenement for twenty-nine days be forcibly prevented residing there eleven days more, he does not thereby gain a settlement. 7 T. R. 105

22. *A.* took a tenement of 10*l.* a-year in the parish of *B.* and after living in it with his family five days he was arrested and sent to prison in the parish of *C.* but his wife and children continued in it seven weeks longer; held that no settlement was gained in *B.* either by the husband or wife.

R. v. *St. George the Martyr, Southwark* (*Inhab.*) 7 T. R. 466

23. In order to gain a settlement by forty days residence on a tenement, the party must stand in the relation of tenant of the premises during the whole time. *R.* v. *South Lynn* (*Inhab.*) 5 T. R. 664

24. So that a residence of 33 days by a widow on a tenement of 10*l.* a-year cannot be coupled with a residence on the same tenement with her husband for sixteen days preceding, so as to give her a settlement. 5 T. R. 564

25. The occupation of a cottage for 40 days, by the leave of the former tenant, who then went out, under an agreement with him to pay the same rent to the landlord which he had before done, but without any authority from the landlord (the cottage, together with other premises occupied at the same time being 10*l.* a-year and upwards), was holden to give the occupier a settlement. *R.* v. *Aldborough* (*Inhab.*) 1 E. R. 597

26. Residence for forty days, on a tenement at the yearly rent of 10*l.* the landlord paying rates and taxes, will confer a settlement on the tenant. *R.* v. *St. Paul, Deptford* (*Inhab.*) 13 E. R. 320

27 Where a corporation, by a verbal agreement with a pauper, leased to him the tolls of a market for above 10*l.* a-year; held that he could not gain a settlement thereby, as no interest could pass from a corporation but under their seal; therefore he had no more than a mere licence to collect the toll. But if such toll had been leased to him under seal of the corporation, *semble* that he would have gained a settlement by residing for 40 days in the same parish where the market was. *R.* v. *Chipping-Norton* (*Inhab.*) 5 E. R. 239

28. It is not necessary that the pauper should pay 10*l.* a-year in money for a tenement, in order to gain a settlement; it is sufficient if he occupy a tenement of the annual value of 10*l.* as tenant. *R.* v. *Fritwell* (*Inhab.*) 7 T. R. 197

29. The criterion by which the court form their judgment is not the *ability* of the party coming to reside on a tenement of 10*l.* a-year; for if a person be trusted with a tenement of that value, even out of charity, that is sufficient. 1 T. R. 458

30. The pauper *took* a tenement at 11*l.* a-year which he occupied, still receiving parish pay for six months after; having previously agreed to underlet to another, a part, for 5*l.* a-year, which other *guaranteed* to the landlord the payment of the rent, without which he would not have let to the pauper; but the pauper paid the whole rent for the first year; held, that this was a coming to settle upon a tenement of 10*l.* a year within the stat. 13 and 14 *Car.* 2. c. 12. by occupying which for forty days irremoveable, the pauper gained a settlement; though the Sessions concluded from the whole of the case that *credit* was given by the landlord to the pauper *for* 6*l. a-year only of the rent*, and that for the residue the credit was given to the guarantee; for if the pauper were *legal tenant* of the whole, it was immaterial whether *credit* were given him for the *rent*. *R.* v. *Hooe* (*Inhab.*) 4 E. R. 362

31. A foreigner may gain a settlement here by occupying a tenement of 10*l.* a-year for 40 days. *R.* v. *Eastbourne* (*Inhab.*) 4 E. R. 103

32. Where a pauper was permitted by several persons, having a right of common, to occupy a tenement of 10*l.* a-year value as a reward for his service as a herd, it was held that that gave him a settlement. The service of the pauper was equivalent to his paying rent. *R.* v. *Melkredge*. 1 T. R. 598

33. So repairing gates was held equivalent to payment of rent. *R.* v. *Whixley*. 1 T. R. 137

34. In order to gain a settlement by coming to settle on a tenement of 10*l.* *per annum*, it is not necessary that the party should *rent* such a tenement, or that the whole should lie in one parish; it is sufficient if he occupy 9*l.* *per annum* of his own in the parish of *A.* and rent a tenement of 1*l.* *per annum* in the parish of *B.* *R.* v. *Culmstock* (*Inhab.*) 6 T. R. 730

35. Where a pauper rented a tenement of 8*l.* a-year in *A.* and held another of 2*l.* 10*s.* *per annum* in *B.* under a parol demise from his brother *to hold as long as the brother pleased, and to be taken by him again when he pleased*, and was to pay nothing for it, this was held a sufficient taking of a tenement of 10*l.* *per annum* under stat. 13 and 14 *Car.* 2. *c.* 12., for the purpose of giving the pauper a settlement. *R.* v. *Fillongley*. 1 T. R. 458

36. A man had a tenement of above 10*l.* a-year in *A.*, in which he generally, and his wife and family constantly, resided for several years, but he occasionally slept in *B.*, where he had another tenement under 10*l.* a-year, which he had lately taken for the more conveniently carrying on of his business; and upon the whole he slept in *B.* above 40 nights, and particularly for the last night, when both the tenancies expired: held that his settlement was in *B.* *R.* v. *St. Mary, Lambeth* (*Inhab.*) 8 T. R. 240

37. A pauper rented land in *A.* of the annual value of 6*l.* 10*s.* 6*d.*, and built on part of it a post-windmill at the expense of 120*l.*, which, by agreement with his landlord, he was to be at liberty to remove at pleasure: he let the mill for a part of the time at the rent of 9*l.* *per annum*; held, that this was not the taking of a tenement of 10*l.* a-year so as to confer a settlement in *A.* *R.* v. *Londonthorpe*, (*Inhab.*) 6 T. R 377

38. A fraudulent renting of 10*l.* *per annum* will not give a settlement. *R.* v. *Woodland*. 1 T. R. 261

39. A tenement found to be of the value of 4*s.* a-week, and to be demiseable at all times of the year, if let *by the week*; but not to be of the value

of 10*l.* a-year, to be let *by the year;* cannot coufer a settlement on the occupier by residence thereon for forty days. *R.* v. *Hellingley (Inhab.)* 10 E. R. 41

40. Where a pauper rented a meadow for ten guineas a-year, and did not stock it, but let the grass for the first half year to *A. B.* for three guineas, who stocked it, and paid him, and then the pauper paid his landlord half a year's rent, and then let the mowing of his meadow to his landlord for five guineas, and the after-grass for two guineas, and at the end of the year received two guineas from his landlord on the balance of accounts: the Sessions adjudged this a fraudulent taking, which the Court confirmed. 1 T. R. 261

41. If the Sessions draw a conclusion of fact that the taking of a tenement is fraudulent, or that it does not amount to 10*l. per annum*, it is decisive here, though they state all the facts, and refer the consideration of those questo this Court.
R. v. *Llanwinio (Inhab.)* 4 T. R. 473

42. In settlement cases the Court will not infer fraud from circumstances: fraud must be stated expressly. 7 T. R. 105

43. Where a person renting and residing on a tenement of 10*l.* a-year in *A.* was removed to *B.* by an order of two justices, and afterwards returned to the same tenement without making any new contract, and resided there more than 40 days, he thereby gained a settlement, though the order of removal was unappealed from; for the contract was not thereby dissolved.
R. v. *Fillongly (Inhab.)* 2 T. R. 709
(See POOR REMOVAL II. 1.)

44. *A.* occupied a tenement of 10*l.* a-year, and died leaving three children living, to two of whom he bequeathed 5*s.* each, and to the other, whom he made executrix, the residue of his property; the pauper who had before married the executrix, resided on the tenement above 40 days, and paid rent for it; this was held to gain him a settlement, though the wife never proved the will.
R. v. *Netherseal (Inhab.)* 4 T. R. 258

45. *A.* agreed with *B.*, on *B.*'s taking a farm of *C.* of the yearly value of 120*l.* to become joint partner with *B.* in the stock and farm; but there was no agreement between *A.* and *C.*; it was held that *A.*, who lived with *B.* on the farm more than 40 days, thereby gained a settlement.
R. v. *Seamer (Inhab.)* 6 T. R. 554

POST AND POST-OFFICE.

1. The statute 9 *Ann, c.* 13. § 40. which inflicts a penalty of 20*l.* on persons who willingly open or detain letters, after they have been delivered at the Post-office, only extends to persons in the employment of the Post-office.
Martin v. *Ford.* 5 T. R. 101

2. It seems that it is not a felony within 7 *G.* 3. *c.* 50. § 1. for a person employed in the Post-office to steal out of a letter entrusted to his care, a draft on a *London* banker, purporting to be drawn in *London*, but actually drawn about ten miles from *London*, on unstamped paper.
R. v. *Pooley.* 3 B. & P. 311

3. It seems also that § 2. of the same act does not apply to persons employed in the Post-office; and that a person of that description therefore, who steals a letter out of the Post-office, is not guilty of felony under that section. *ib.*

POUND.

1. A pound-keeper is bound to receive every thing offered to his custody, and is not answerable whether the thing were legally impounded or not.
Branding v. *Kent.* 1 T. R. 62

2. It is no answer to an action for treble damages on stat. 2 *W.* & *M. c.* 5., for a pound breach, that the rent and demand were tendered after the distress and impounding.
Firth v. *Purvis.* 5. T. R. 432

POWER.

1. Devise in fee to a femme covert with a power to dispose of the estate without the controul of her husband: the Court of C. P. held that such a power was void, as being inconsistent with the fee given to her in the first instance, and that she could not convey without fine.
Goodill v. *Brigham.* 1 B. & P. 192

2. A lease made, under a special power by a tenant for life, for a longer term than his own life, is void on his death, unless the power be strictly pursued.
Doe d. Ellis v. *Sandham.* 1 T. R. 705

3. So that under a power to a tenant for life to lease for years, reserving the usual covenant, *&c.* a lease made

by him, containing a proviso that in case the premises were blown down or burned, the lessor should rebuild, otherwise the rent should cease, is void; the jury finding that such covenant is unusual. *ib.*

4. Under a power to lease for 21 years *reserving the best rent*, so as the lease should not contain any clause whereby authority thould be *given* to the lessee to commit waste, or whereby he should be exempted from punishment for committing waste; and so as such lease should contain such other conditions, covenants, and restrictions, as were generally inserted according to the usage of the counties where the premises were: held that a lease was good, though the lessor thereby took the repairs of the mansion-house (excepting the glass windows) on himself, and covenanted if he did not repair it within three months after notice, the tenant might, and deduct the charges out of the rent reserved to the lessor; and though the lessor covenanted, in consideration of a large sum to be laid out by the lessee in repair of the premises in the first instance, to renew during his (the lessor's) life, at the request of the lessee, his executors, &c. on the same terms: because the covenant only bound the lessor himself, and if the best rent were not reserved upon such renewal, the lease would be void against the remainderman. *Doe d. Bromley, Bart.* v. *Bettison* 12 E. R. 305

The sufficiency of the rent must be governed by the consideration on whom the onus of repair is thrown. 12 E. R. 305

5. A lease at 43*l.* a year, granted under a power directing the *best* rent to be reserved, cannot be impeached merely by shewing that the lessor rejected two specific offers, one of 50*l.* and another from 50 to 60*l.* from other tenants, though the responsibility of such other tenants could not be disproved; for in the exercise of such a power, where fairly intended, and no fine or other collateral consideration is received, or injurious partiality plainly manifested by the lessor, all other requisites of a good tenant are to be regarded, as well as the mere amount of the rent offered, unless something extravagantly wrong in the bargain for rent be shewn.—Semble that the *best* rent means the best rack-rent that can *reasonably* be required by the landlord, taking all the requisites of a good tenant for the permanent benefit of the estate into the account.

Doe v. *Radcliffe.* 10 E. R. 278

6. Every execution of a power must have a reference to the original instrument creating that power; and whoever claims under the execution must make title under the power itself.

Robinson v. *Hardcastle.* 2 T. R. 241. 380. 781.

7. So that where a power was given to *A.* on his marriage, to appoint to and amongst the children of the marriage, in such proportions, *&c.* and in default of such appointment, the estate was limited to the first and other sons of the marriage in tail, and *A.* by will appointed to his eldest son *C.* for life, remainder to trustees, *&c.* remainder to the first and other sons of *C.* in tail, and in default of such issue to *D.*, another child of *A.*, the limitation of a life-estate to a person not in being at the original creation of the power being void, the subsequent limitations depending thereon are void also, and *C.*, the eldest son, took an estate-tail either under the execution of the power, or the original settlement.

2 T. R. 241. 380. 781.

8. A power of appointment under a marriage settlement unto and among all or any the child or children of the marriage, for such estates as the husband and wife, *or the survivor* of them, should from time to time, either with or without power of revocation, direct, limit, or appoint, may be executed by the survivor, after a joint appointment, reserving to them, and the survivor, a power of revocation and appointment. But under such power, if the second appointment be to the daughter of the marriage for life, remainder to the eldest son for life, remainder to trustees to preserve contingent remainders, remainder to the first and other sons in tail, &c. remainder to the daughter in fee; all the limitations subsequent to that to the eldest son for life are void, as being an excess beyond the power; and the ultimate remainder dependant upon such intermediate limitations, though made in favour of one of the objects of the power, is also void, and shall not be accelerated by the event of such void intermediate limitations not having taken effect, for want of issue male of the eldest

fon, &c. to whom the appointment was made. For an appointment not good in its creation will not become so by subsequent circumstances: and such an appointment being by deed cannot be construed *cy près*, so as to give the son's estates tail, as perhaps might have been the case if the appointment had been by will.

Brudenell v. *Elwes.* 1 E. R. 442

9. A power of appointing by will is not executed by a mere devise of the residue. 2 H. B. 136

(See BOND IV. 1.)

10. Under a power of appointing a real estate to the use of such *child and children*, &c. and where in default of appointment the estate was settled "to the use of all and every the child and children," an exclusive appointment to one is good. *Swift d. Huntley & Ux.* v. *Gregson.* 1 T. R. 432

11. Under a power of appointing real and personal estate "*to and amongst such of the testator's relations as shall be living at the time of his death, in such parts, shares, and proportions*, &c." an exclusive appointment to one is good. *Spring d. Titcher* v. *Biles & al. B. R. M.* 27 *G.* 3; and *M.* 24 *G.* 3. 1 T. R. 435, *n.*

12. A power to appoint to children was held to extend to grandchildren: because the Court thought that it was the intention of the person creating the power that it should be so executed; and there being no rule of law against it, as all the objects of the appointment were in existence when the power was created. *Doe d. Devonshire (D.)* v. *Cavendish (Ld.)* *H.* 22 *G.* 3. 4 T. R. 741, *n.*

13. A power to raise portions may be executed at several times, provided the first execution be not meant as a complete execution, and that the party in the whole execution do not transgress the limits of their power.

Doe v. *Milborne.* 2 T. R. 721

14. A power given to *an executrix* to raise a portion for a younger child does not extend to real estates, of which she was also trustee. 2 T. R. 721

15. Under the settlement of an estate with a power to the tenant in possession to let *all or any part* of the premises, *so as* the usual rents be reserved, a lease of tithes which had not been let before, was held void.

Pomery v. *Partington.* 3 T. R. 665

16. In these cases, the intention of the parties is to govern the Court in construing the power: (and see No. 12.) 3 T. R. 665

17. Under a power in a will to lease, *in possession* and *not in reversion*, a lease for years executed the 29th of *March* to the then tenant in possession, *habendum* as to the arable from the 13th of *February* preceding, and as to the pasture from the 5th of *April then next*, &c. under a yearly rent payable quarterly, on the 10th of *July*, 10th of *October*, 10th of *January*, and 10th of *April*, is void for the whole; though such lease were according to the custom of the country, and the same had been before granted by the person creating the power.

Doe d. Allen v. *Calvert.* 2 E. R. 376

18. Where, in a marriage settlement made by tenant in tail, he settled the same to himself for life and to the children of the marriage in strict settlement; with a proviso that it should be lawful for him by deed or instrument in writing attested by three witnesses and *to be enrolled*, with the consent in writing of certain trustees, to revoke the old, and declare new uses: held, that a deed of revocation executed by him and all the trustees in person except one, and the consent of that one being given by means of a general power of attorney before made by him to the settlor to consent to any such deed he might think proper to make, by virtue of which the settlor executed the deed for and in the name of such trustees, is bad, though properly attested and inrolled; and that another deed of revocation properly executed and assented to, but *not inrolled till after the settlor's death*, was also void; for that every thing required to be done in the execution of such a power must be strictly complied with, and must be completed in the life-time of the person by whom it is to be executed: and also held that the defect of the one deed could not be supplied by the other.

Hawkins v. *Kemp.* 3 E. R. 410

19. The lease of a tenant for life, who has power of leasing under certain conditions, must strictly comply with the conditions; and if it vary from them in the interest demised, or the rent reserved, it cannot be supported against the remainder-man. *Doe d. Pultney* v. Lady *Cavan.* 5 T. R. 567

(Affirmed in *Dom. Proc.* 7th *May*, 1795; and see title LANDLORD and TENANT II. 3., 4.: and LEASE I. 8.)

20. By a marriage settlement an estate was settled to the use of the wife for life, remainder to such persons and for such estates as she should by deed or will attested by three witnesses appoint, and for want of such appointment reversion to herself in fee: during her husband's life she made a will in pursuance of the power, devising her estate to *A.* in fee; after which she and her husband executed a lease of part of the settled estate to the defendant, not executed pursuant to the power; and after the husband's death she received rent from the defendant: held, that such lease was avoidable only by her upon her husband's death, and that her receipt of rent accruing afterwards was a confirmation of it against *A.*, who claimed under the appointment by the will.

Doe d. Collins v. *Weller.* 7 T. R. 478

21. Under a power of leasing for one, two, or three lives, or for any term of years determinable on one, two, or three lives, such lands as were then demised for any such term, lands are not included which were then held under a demise to "*W.* and *G.* 99 years if *W.* and his widow and any eldest son living or *in ventre sa mere*, at the time of his (*W.*'s) death, or if no son, any eldest daughter then living or *in ventre sa mere*, or any other of those three, *viz.* of the said *W.* and such his wife, son, or daughter should so long live, remainder to the said *G.* and his widow, son, or daughter, in the same manner," of which description of persons five were in fact living at the time of the power reserved, who were all entitled in successions, three at a time, to come in under the lease; for under such a general power the three lives must be certain and co-existing.

Doe d. Wyndham v. *Halcombe.* 7 TR 713

22. Under a devise to trustees, their heirs, &c. of freehold and leasehold estate, on trust *to permit and suffer the testator's wife to receive and take the rents and profits until his son should attain* 21, and then to the use of his son in fee: and a devise of other lands to the trustees, upon trust to receive the rents and profits till his son attained 21; and in the mean time to apply the profits in discharging the interest of a bond of 3,000*l.*; and on the son's attaining 21, upon trust by sale, lease, or mortgage of the last-mentioned premises, to raise the 3,000*l.*, and discharge the bond; and subject thereto, to the use of his son in fee on his attaining 21. And a third devise of other lands, and the residue of his real and personal estate, to the use of the same trustees, on trust by sale, lease, or mortgage of the same, to raise 3,000*l.* and pay it to his daughter *Elizabeth:* and after payment thereof, absolutely to sell and dispose of so much of the residue of his said lands, &c. as they should think proper, to raise money to pay his debts, legacies, and funeral expenses, and then upon trust to pay the interest and produce of his real and personal estate to his then wife, for the maintenance of herself and two children, till the latter should attain 21, if she continued his widow; but if not, then for the benefit of the two children till 21; and then to transfer to those children such residue; with further trusts if either or both of them died under 21: With a

Proviso, "that it should be lawful for the trustees, and the survivor, at any time or times *till all* the said lands, &c. devised to them *should actually become vested in any other person or persons by virtue of the will*, or *until the same or any part thereof should be absolutely sold as aforesaid*, to lease the same or any part thereof, for any term of years not exceeding fourteen, at the best rent."—

Held that the devise in the first clause to the trustees, upon trust *to permit and suffer the testator's wife to receive and take the rents and profits* of the lands there described until his son *attained* 21, vested the legal estate of those lands in her, and was not affected by the subsequent leasing proviso given to the trustees; which was confined to premises originally vested in them as trustees, or over which, when afterwards becoming vested in others, the trustees retained a power of sale. *Right d. Harriet Phillips & al.* v. *Smith.* 12 E. R. 455

23. Where a power of leasing was given to the father tenant for life, and *after his decease* to the son tenant for life: and the son obtained a grant from their father of his life estate (without noticing the power) subject to a cer-

tain rent, with power of re-entry for non-payment, &c.: held that the son during the life-time of the father could not lease under the power.
Coxe (an infant) v. *Day*. 13 E. R. 118

24. Under a leasing power with a condition of re-entry on non-payment of rent, for 21 days, a lease granted with condition of re-entry on non-payment of rent for 20 days, in case no sufficient distress can be taken on the premises whereby to levy the rent, &c. is not a good execution of the leasing power, such conditional power of re-entry being less beneficial to the remainder-man than an absolute power of re-entry on non-payment of rent.
13 E. R. 118

25. If a power of a public nature be committed to several, who all meet for the purpose of executing it, the act of the majority will bind the minority. Therefore, a condemnation of four out of the six triers of leather appointed under 1 *Jac.* 1. *c.* 22., (the whole number being met for the purpose of trying), must be considered as the condemnation of all. *Grindley & al.* v. *Barker & al.* 1 B. & P. 229

26. A power to appoint a schoolmaster to an ancient foundation given to the vicar and churchwardens (of whom there was eleven) and in case of their neglect in appointing, then to devolve to two corporate bodies in succession, and to result, in the dernier resort, to the same vicar and churchwardens, to whom also the general power of managing the trust was committed, is well executed by the vicar and a *majority* of the churchwardens; especially if such an election be supported by usage.
Withnell v. *Gartham*. 6 T. R. 388

PRACTICE.

I. *Appearance; or Attendance, on Summonses, &c.*

1. Attendance on a judge's summons for half an hour next immediately following the return thereof shall be deemed sufficient. *Reg. Gen. T.* 35 *G.* 3.
6 T. R. 402

2. On every appointment by the master, the party served shall attend such appointment without waiting for a second: otherwise the master shall proceed *ex parte* on the first appointment. *Reg. Gen. H.* 32 *G.* 3. 4 T. R. 580

3. Service of rules, orders, or notices after 10 o'clock at night, not valid. *Reg. Gen. K. B. M.* 41 *G.* 3.
1 E. R. 132

4. In an action on a bail-bond, if the issue depends on the date of the appearance, the Court, upon an application by the plaintiff, will order the *day* of the appearance to be entered in the filazer's book, although before the application to the Court issue has been already joined on the plea of *comparuit ad diem*.
Austen & al. v. *Fenton*. 1 W. P. T. 23

5. Where the defendant was summoned to appear before the King's justices at *Westminster* upon the morrow of *Saint* ——: the Court held that the defect might be waived by his subsequent conduct.
Harris v. *Mullet*. 1 W. P. T. 59

II. *Arguing Cases, Demurrers, &c.*

1. All special cases set down for argument by the clerk of the papers shall be entered within the four first days of the term next after the trial at which such special cases have been reserved; and none shall ever be set down for argument on any of the four last days of the term. *Reg. Gen. M.* 38 *G.* 3.
7 T. R. 454

2. No rules entered in the peremptory paper shall be enlarged during the term, or put off from the appointed day, by the content of counsel, or of the attornies, without leave of the court. *Reg. Gen. K. B. East.* 41 *G.* 3.
1 E. R. 497

3. The paper books in causes entered for argument on *Tuesdays* shall be delivered to the judges on the *Saturday* preceding; and in those entered for *Fridays* on the *Tuesday* preceding; with such marginal notes as are directed by the rule of *Hil.* 38 *G.* 3. *Reg. Gen. K. B. Trin.* 40 *G.* 3.
1 E. R. 131

4. All arguments upon demurrers and other arguments in C. P. are to be heard on *Mondays* and *Thursdays* only. *Reg. Gen. C. P. H.* 42 *G.* 3.
3 B. & P. 110

5. Where issues are taken on some of the pleas and demurrer to others, the plaintiff has a right to argue the demurrers either before or after trial. *Duberley* v. *Page*. 2 T. R. 394

6. Where the same plaintiff brought three actions of trespass against three several defendants for different parts which

they took in the same transaction: one against the Speaker of the House of Commons, who justified under a warrant issued by him under the order of the House for arresting and committing to the *Tower* the plaintiff, a Member of the House, for a breach of privilege, in publishing a libel upon the House; to which justificatory plea the plaintiff demurred: another against the Serjeant at Arms; who pleaded *not guilty*, and also justified under the authority of the Speaker's warrant, to which the plaintiff replied, an excess in the manner of executing it by a military force, and with improper and unnecessary violence; on which issue was joined to the country: and the third against the Constable of the *Tower*, who received and detained the plaintiff as a prisoner, and who also justified under a warrant from the Speaker for that purpose; in which issue was also taken to the country on several facts stated in the justification; and notice of trial was given in the last two causes (which stood for trial at bar on a day fixed); but the plaintiff, though still within time by the general rules and practice of the court, had not set down his demurrer in the first cause for argument: The Court on motion of the Attorney General on behalf of the Serjeant at Arms, and of the Constable of the *Tower*, postponed the trial of issues in those cases until after the argument on the demurrer in the cause against the Speaker; because the right, just, and distinct consideration of the question which arose on the issues of fact, and on the true measure of damages in the causes against the Serjeant at Arms and the Constable of the *Tower*, depended mainly upon the decisions of the issues in law joined in the other action against the Speaker: and though the same question of law might ultimately be raised on motion in the two former actions, yet it could not be considered so conveniently to the court, to whom the decision of such question belonged, or so advantageously to the party who should prove to be in the right, as upon the demurrer which presented the question of law distinct from the question of fact. *Burdett (Bart.)* v. *Colman &* v. *Moira (Earl).* 13 E. R. 27

III. *Bail.*

1. If a man carry on his business at a lodging in one place, and keep a house at another, notice of bail describing him as of the former place is sufficient. *Weddal* v. *Berger.* 1 B. & P. 325
2. Where bail are regularly put in and excepted to, the defendant need not describe them in his notice of justification. *England* v. *Kerwan.* 1 B. & P. 335
3. Bail must actually have become so before notice of justification is given. *Collier* v. *Godfrey.* 1 H. B. 291
4. In C. P. two days notice of justification must be given, as well where the bail originally put in, as where added bail are brought up. *Nation* v. *Barrett.* 2 B. & P. 30
5. In justifying bail by affidavit where the same persons are bail in more actions than one, each affidavit ought to state that the bail are worth double the amount of the debts in all the actions wherein they offer to become bail. *Field* v. *Wainewright.* 3 B. & P. 39
6. The plaintiff cannot file common bail, according to the statutes, after the succeeding term after the writ is returnable. *Smith* v. *Painter.* 2 T. R. 719
7. Where a writ is returnable the first return of a term in a country cause, the defendant (in C. P.) has eight days after the *quarto die post* to put in bail. 2 H. B. 276
8. Where a rule to set aside proceedings for irregularity, and to stay proceedings in the mean time, is obtained, the proceedings are suspended *for all purposes* till the rule is disposed of. *Swayne* v. *Crammond.* 4 T. R. 176
9. And therefore the time for putting in bail remains the same after the rule is discharged, as it was when it was granted. 4 T. R. 176
10. The clerk of the bails in K. B. is directed in future to mark the bail-pieces numerically as they are received. *Reg. Gen.* (*K. B.*) *E.* 30 *G.* 3. 3 T. R. 660
11. If a defendant be arrested by process of *K. B.*, and removed by *habeas corpus* to *C. B.* he may put in and justify bail in either court. *Knowlys, & al.* v. *Reading.* 1 B. & P. 311
12. If bail be put in with the filazer of the county in which the defendant is arrested on a *testatam capias*, the bail may be treated as a nullity and an attachment issue. *Clempson* v. *Knox.* 2 B. & P. 516

13. Bail is not regularly put in till the allowance of it has been served, even though the plaintiff oppose the justification. *R.* v. *Middlesex Sheriff.* 4 T. R. 493

14. Or be otherwise informed of it. *Holland* v. *White.* 2 B. & P. 341

15. This practice proceeds not only on the ground of protecting the revenue, but also on the notion that the defendant must be taken to have waived his justification unless he serve the rule for the allowance. 2 B. & P. 324

16. Bail above may be put in on a *dies non juridicus.* *Baddeley* v. *Adams.* 5 T. R. 170

17. Bail are not regularly put in unless the name of the proper county be inserted in the bail-piece. *Smith* v. *Miller.* 7 T. R. 96

18. The want of a description of bail is cured by the plaintiff's excepting to them. *Bigg* v. *Dick.* 1 W. P. T. 7

19. It is no exception against bail until the plaintiff give notice of the exception. *Oldham* v. *Burrell.* 7 T. R. 26

20. Where bail are opposed, and rejected, and the defendant is surrendered on the next day, he may justify new bail without paying the costs of the former opposition. *Holward* v. *Andre.* 1 B. & P. 32

21. Where the action is by original, the defendant in (K. B.) has till four days after the *quarto die post* to put in bail. *Frampton* v. *Barber.* 4 T. R. 377

22. If the fourth day for perfecting bail (in K. B.) be the last day of term, and the bail be not perfected before the rising of the court on that day, an assignment of the bail bond to the plaintiff in the evening of that day is regular. *Dent* v. *Weston.* 8 T. R. 4

23. Of the four days allowed to perfect bail in, after an exception, the first is reckoned (in C. P.) exclusively, and the last inclusively; so that where the exception was on *Wednesday*, an attachment could not regularly issue against the sheriff till the *Tuesday* following (*Sunday* being no day); but though the attachment did issue on the *Monday*, the court would not set it aside, because the *bail was not* perfected. *North* v. *Evans.* 2 H. B. 35

24. Time for putting in bail expired on the 30th; defendant on the 31st moved to justify, pursuant to a notice previously given; held, that the plaintiff was entitled to the costs of preparing to move for an attachment. *Jarett* v. *Creary.* 3 B. & P. 603

25. The defendant has four days exclusive, from the day of the exception to justify bail; and if an attachment be obtained on the fourth day, the court will set it aside, without first calling on the defendant to justify bail. *Maycock* v. *Solyman.* 1 N. R. 139

26. If a bail above be put in and justified within four days from the ruling the sheriff to bring in the body, the court will set aside all proceedings upon the bail bond commenced previous to the time of justification. *Wright* v. *Walker.* 3 B. & P. 564

27. If bail to the sheriff be put in above, and exception taken before an assignment of the bail bond, they are bound to justify notwithstanding such assignment. *Hill* v. *Jones.* 11 E. R. 321

28. Where bail are put in *in due time*, the defendant is not bound to give notice, but the plaintiff must search in the filazer's book, otherwise if they be *not put in in due time.* *Dawkins* v. *Reid.* 1 H. B. 529

29. The judgment in an original action, and the judgments in the actions against the bail, may be set aside upon one motion, and one affidavit entitled in the original action. *Winder* v. *Wood.* 3 B. & P. 118

30. The court will enter an exoneretur on the bail-piece on payment of the sum sworn to and costs, though less than the sum acknowledged to be due, as well where the action is by original as by bill. *Jacob* v. *Bowes.* 6 E. R. 312

31. Defendant is estopped by the recognizance of bail entered into for him by the name in which he is sued, from pleading a misnomer, though he himself be no party to the recognizance. *Meredith* v. *Hodges.* 2 N. R. 453

32. If defendant put in special bail within four days in a town cause he is entitled to plead in abatement, provided such bail be afterwards perfected in time, though he had before put in other bail, and given notice of justifying, but had withdrawn them in time. *Hopkinson* v. *Henry & al* 13 E. R. 170

33. The sheriff cannot be ruled to bring in the body until the time for putting in bail has expired. *R.* v. *Sheriff of Middlesex.* 8 E. R. 525

34. If bail is added to an attorney, and justifies without opposition, the Court

will not set aside the allowance of bail. *Bell* v. *Gate.* 1 W. P. T. 162

85. A false addition in the description of bail is a fatal objection.
Wood v. *Chadwick.* 2 W. P. T. 173

86. In bailable causes for any cause exceeding 1000*l.* it shall be sufficient for the bail to justify in 1000*l.* beyond the sum sworn to.
Reg. Gen. Mich. 51 *G.* 3. 13 E. R. 62

87. Defendant having been sued, and held to bail by a wrong christian name, the plaintiff having declared against him, and bail having been put in and perfected by the right name, the bail cannot afterwards object to the irregularity on a motion to enter an *exoneretur*. *Clarke* v. *Baker.* 13 E. R. 273

88. The court of K. B. refused to enlarge the time for bail to render the principal, on affidavit that he was a lunatic; it not appearing that he was in such a state as to occasion any immediate peril of life either to himself or others. *Cock* v. *Bell.* 13 E. R. 355

IV. *Certificate of Judges.*

The Court of K. B. will certify in a case sent from the Rolls. *Daintry* v. *Daintry.* 6 T. R. 307

V. *Declaration (filing or delivering.)*

1. It is irregular to file a declaration in the office when the defendant's place of residence is known to the plaintiff.
Oldham v. *Burrel.* 7 T. R. 26

2. It is not sufficient to stick up a notice of declaration in the office, if the defendant's last place of abode is known, for it ought to be served there.
Holsten v. *Culliford.* 1 B. & P. 214

3. If a defendant's place of abode be unknown, application must be made to the Court that affixing the declaration in the office may be deemed good service. *Weller* v. *Robinson.* 1 W. P. T. 433

4. Where the defendant and his attorney had been informed that a notice of declaration was stuck up in the office, the court refused to set aside a judgment for want of service of the notice at the defendant's last place of abode.
Losemore v. *Cohen.* 1 N. R. 279

5. The plaintiff may deliver a declaration against the defendant conditionally before the time for his appearing is past, and file common bail for him; but after that time he must bring the defendant into court before he can declare. 2 T. R. 719

6. Serving notice of declaration filed together with the writ at the same time is irregular. *Stewart* v. *Lund.* 12 E. R. 116

7. An appearance entered after the essoin day, and before the day of full term, may be entered as of the preceding term; and therefore a non-pros entered after the second term for want of declaring before the end of such second term is good.
Prigmore v. *Bradley.* 6 E. R. 314

7. Where process is *returnable on the last return of the term*, a declaration *de bene esse* may be filed, with notice to plead within the four first days of the next term. *Abbey* v. *Martin.* 1 H. B. 533

8. The plaintiff cannot deliver a declaration *de bene esse* after the time for the defendant's appearance is expired.
Baker v. *Cooper.* 6 T. R. 548

9. If one of three defendants in a joint action appear to a *quare clausum fregit*, and the two others, being arrested on bailable process, have till the ensuing term to justify bail, and the Plaintiff previous to that time deliver a declaration against all three, indorsed "conditionally until special bail is perfected," this is irregular.
Turner v. *Portall & al.* 2 N. R. 281

10. And the practice is the same whether the process be bailable or not bailable.
Kenman v. *Bean.* 2 N. R. 433

11. Defendant having been arrested on a *capias*, returnable on the first return of the term, on the day before the essoin day, took out a summons to stay proceedings upon payment of the debt and costs; on the essoin day plaintiff filed a declaration *de bene esse*, and on the day after the essoin day defendant obtained an order to stay proceedings; held, that the plaintiff was entitled to the costs of the declaration.
Fawcett v. *Christie.* 2 B. & P. 515

12. If after a plea in abatement the plaintiff enter on the roll *quod billa cassetur et defendens eat sine die*, he may at any time during the same term in which the writ is returnable deliver a declaration by the by against the defendant.
Milles v. *Andrews.* 5 T. R. 634

13. A plaintiff in a *qui tam* writ cannot declare by the by in his own name, before he has declared in chief.
Delves q. t. v. *Strange.* 6 T. R. 158

14. Nor can a plaintiff in any case declare by the by before he has declared in chief. 7 T. R. 80

15. But the taking out of the office a declaration by the by, which was delivered before any declaration in chief, is a waiver of the irregularity.
Archer v. *Barnes.* 3 E. R. 342

16. Where the declaration filed in the office before defendant's appearance was indorsed, "*filed conditionally*," and judgment afterwards signed for want of a plea, the court held it regular: though the notice served on the defendant was of a declaration *generally*.
Cort v. *Jacques*. 8 T. R. 77

17. In C. P. notice of declaration is not necessary in bailable actions.
Holin v. *Burgus*. 2 B. & P. 42

18. In an action against forty-six defendants, where the declaration contained two counts for work done by plaintiff as an attorney, and two more for work done by him, without saying in what capacity; the court ordered two counts to be struck out, and the word defendants to be substituted for the names of the defendants in all the places where they occurred, except the first. *Meeke* v. *Oxlade & al.* 1 N.R. 289

19. Notice of declaration for *Saturday*, *Sunday* being the essoin day of the term, held a nullity.
Moffat v. *Carter*. 2 N. R. 75

20. The rule to declare in replevin may be served at any day before the time in the rule is expired, and the plaintiff must declare within four days after such service.
Edwards v. *Drench*. 11 E. R. 183

VI. *Delay; how it shall affect Proceedings, and of remedying same.*

1. If the plaintiff take no step in the cause for three terms, and in the fourth sign a *concilium*, and obtain judgment in the fifth, the signing the *concilium* is taking a step in the cause, so as to make it unnecessary to give a term's notice.
Bland v. *Darley*. 3 T. R. 530

2. The rule, requiring a term's notice after a delay of four terms, is to prevent surprise on the defendant, and therefore does not apply where the proceedings have been delayed at the defendant's request. 3 T. R. 530

3. No proceedings having been had for above a year, the plaintiff, two days before *Hilary* term, gave notice of his intention to proceed; two days after the term, he served a rule to plead, and in the same vacation judgment was signed for want of a plea, which was held to be regular; and the judgment appearing to be signed as of *Hilary* term makes no difference.
Milbourne v. *Nixon*. 2 T. R. 40

4. If the plaintiff do not declare within two terms after the return of the writ, the defendant may sign judgment of *nonpros*; but if no such judgment be signed, the plaintiff may declare within a year. *Worley* v. *Lee*. 2 T. R. 112: and *Penny* v. *Harvey*. 3 T. R. 123

5. One of two defendants having been holden to bail in *Trin.* term, the plaintiff proceeded to outlawry against the other, and delivered a declaration against the former on the first day of *E.* term, not having obtained a rule for time to declare; held, that the cause was out of court, and the bail entitled to an *exoneretur*. *Sykes* v. *Bauwens and another*. 2 N. R. 404

6. On a rule to plead, reply, &c. in four days, if the party on whom the rule is made delay complying with it till the morning of the fifth day, the adverse party may refuse to receive it, and sign judgment.
Thomson v. *Ryall*. 4 T. R. 195

7. The plaintiff in an action for bribery on stat. 2 *G.* 2. *c.* 24. is bound by § 11. to proceed without *wilful delay*; and if he do not proceed to trial till six years after issue joined, and assign no reason for it, the court will consider the delay to be *wilful*, and even after verdict will stay the proceedings on motion, and will not allow the plaintiff his costs. *Petrie* v. *White*. 3 T. R. 5

8. The defendant is entitled to the benefit of the act, though he do not claim it so soon as he might. 3 T. R. 5

9. Where several causes are consolidated, if a writ of error be issued in the cause tried and execution taken out for want of bail in error being duly put in, execution in those causes is thereby stayed: for the consolidation rule only relates to the verdict.
Aylwin v. *Favine*. 2 N. R. 430

11. Upon the death of the attorney in the cause, notice must be given to the opposite party of the appointment of the new attorney, before he can proceed in the cause.
Ryland v. *Noaks*. 1 W. P. T. 342

VII. *Ejectment.*

1. The clerk of the rules shall keep a book for entering rules in ejectments, containing a list of the ejectments moved, the number of the entry, the county and the names of the parties; and the rule for judgment shall be drawn up and taken away from the office within two days after the end of the term in which the ejectment shall be moved.
Reg. Gen. (K. B.) *M.* 31 *G.* 3. 4 T. R. 1

1. The court will not set aside the proceedings in ejectment for irregularity, because the notice at the foot of the declaration is subscribed in the name of the nominal plaintiff, instead of the casual ejector. *Hazlewood d. Price* v. *Thatcher.* 3 T. R. 351

3. A declaration in ejectment may be served on the wife either on the premises or at the husband's house off the premises. *Doe d. Morland* v. *Bayliss,* 6 T. R. 765: *Doe d. Baddam* v. *Roe.* 2 B. & P. 55: *Oates d. Chatterton* v. *Cotes,* S. P.

4. Or *semble* elsewhere: if it be shewn that she lived with the husband, and admitted that he had received the declaration.
Jenny d. Preston v. *Cutts.* 1 N.R. 308

5. Service of a declaration in ejectment on one of two tenants, was held by C. P. to be good service on both. *Doe d. Baily* v. *Roe.* 1 B. & P. 369

6. Affidavit of service made by a person who saw the declaration served, and heard it explained to the tenant in possession is sufficient. *Goodtitle d Wanklen* v. *Badtitle.* 2 B. & P. 120

7. Nailing the declaration on the barn-door of the premises, in which barn the tenant had occasionally slept; there being no dwelling house, and the tenant not being to be found at his last place of abode, was deemed good service. *Fenn d. Buckle* v. *Roe.* 1 N.R. 293

8. The Court of C. P. refused to admit the mere acknowledgment of the wife of the tenant in possession, that she had received a declaration, to bind the husband. *Goodtitle d. Read* v. *Badtitle.* 1 B. & P. 384

9. And that court held the service of a declaration, on a person appointed by Chancery to manage an estate for an infant, to be insufficient.
Goodtitle d. Roberts & Ux. v. *Badtitle.* 1 B. & P. 385

10. A service before the essoin day on the daughter (the tenant and his wife being absent) was held good on the acknowledgment of the wife, though it did not appear the delivery to her by her daughter was before the essoin day. *Smith d. Stourton* v. *Hurst.* 1 H. B. 644

11. In ejectment against several tenants, the name of each was prefixed to the notice served on him; and held that only one rule was necessary on motion for judgment against the casual ejector. *Roe d. Burlton* v. *Roe.* 7 T. R. 477

12. In ejectment for a forfeiture of a lease, the court will compel the plaintiff to deliver a particular of the breaches of covenant, on which he intends to rely.
Doe d. Birch v. *Phillips.* 6 T. R. 597

13. The lessor of the plaintiff in ejectment must prove the defendant in possession of the premises which he seeks to recover, although the defendant has entered into the general consent-rule to confess lease, entry, and ouster. *Goodright d. Balch.* v. *Rich.* 7 T. R. 327

14. If a declaration in ejectment be served on a tenant, and his landlord be admitted to defend, the plaintiff can only recover such premises as the tenant is proved to be in possession of. *Fenn d. Blanchard* v. *Wood.* 1 B. & P. 573

15. The defendant in ejectment is entitled to the general reply, where the plaintiff, claiming by descent, proves his pedigree and stops, and the defendant sets up a new case in his defence, which is answered by evidence on the part of the plaintiff.
Goodtitle d. Revett v. *Braham,* (trial at bar.) 4 T. R. 497

VIII. *Imparlance.*

1. If a writ be returnable the last day of one term, and the defendant do not justify bail until the fourth day of the next, he is not entitled to an imparlance to the third term, though the plaintiff do not deliver a declaration *de bene esse* before the essoin day of the second term.
Rolleston v. *Scott.* 5 T. R. 372

2. And where, in such case, the plaintiff declared after the bail had justified, and signed judgment in the same term for want of a plea; the court held the judgment to be regular.
Bailey v. *Hantler.* 2 B. & P. 126

3. But if the writ by which a replevin is removed be returnable on the first return of the term, and the plaintiff do not declare within four days before the end of that term, the defendant is entitled to an imparlance, though he has not appeared within the term. *Thomson* v. *Jordan.* 2 B. & P. 137

4. When the defendant removes the cause by *habeas corpus* from an inferior court, and the plaintiff does not declare until the next term, the defendant is not entitled to an imparlance.
Smith v. *James.* 6 T. R. 752

IX. *Issue and Issue-Money.*

1. The plaintiff having added the *similiter* to the replication, and delivered the issue to the defendant, who accepts it, but does not pay the issue-money, judgment may be signed by the plaintiff *without* giving *a rule to rejoin.*
Boone v. *Eyre.* 1 H. B. 254
2. The plaintiff does not waive his right of signing judgment for not paying the issue-money by giving notice of trial after demanding it.
Jones v. *Bryant.* 5 T. R. 400
3. The court determined that a pauper plaintiff was not entitled to the issue-money; and that if he sign judgment because the defendant does not pay it, the court will set aside the judgment.
Codron v. *Hayman.* 4 T. R. 509
4. But now no judgment shall be signed for non-payment of issue money; but the issue-money shall remain to be taxed as part of the costs in the cause.
Reg. Gen. K. B. and *C. P. H.* 35 G. 3.
6 T. R. 218: 2 H. B. 552
5. And this extends to all cases.
Fuller v. *Osborne.* 6 T. R. 477
6. The Court of C. P. therefore, refused to allow a plaintiff to sign judgment on the refusal of the defendant to pay for half the paper books delivered to the judges on a demurrer.
Fulham v. *Bagshaw.* 1 B. & P. 292
7. If after issue joined and notice of trial given, the plaintiff enter a suggestion on the roll, and assign breaches under stat. 8 & 9 *W.* 3. *c.* 11, he cannot deliver the second issue without a judge's order. *Ethersey* v. *Jackson.* 8 T. R. 255
8. The issue must be entered as of the term when the rule of reply was given and the *similiter* joined, and not as of the preceding term when the plea was pleaded. *Wood* v. *Miller.* 3 E. R. 204

X. *Irregularity (what shall be, and how remedied).*

1. A plaintiff may sue in his own name, without an attorney, and subscribe the process with his own name as attorney for the plaintiff, in any action, which is no irregularity.
La Grue q. t. v. *Penny.* 2 H. B. 600
2. A plaintiff may sue out execution by a different attorney, from the attorney in the cause, without an order of court for changing the attorney.
Tipping v. *Johnson.* 2 B. & P. 307
3. So the defendant in the original action may bring a writ of error by a different attorney without such an order.
Batchelor v. *Ellis.* 7 T. R. 337
4. If two defendants in trespass suffer judgment by default, and the plaintiff execute writs of inquiry against them separately, and take several damages against them; it is irregular.
Mitchell v. *Milbank & al.* 6 T. R. 199
5. And if the plaintiff enter up final judgment with those several damages against the defendants, it is erroneous.
6 T. R. 199
6. But the court will permit the plaintiff to set aside his own proceedings before final judgment on payment of costs.
6 T. R. 199
7. If a plaintiff after entering up judgment for himself upon two counts, discover an error in one of them, he may wave his judgment on that count, and enter it for the defendant.
Spicer v. *Teasdale.* 2 B. & P. 49
8. Judgment by default having been suffered in an action on a bond, the plaintiff entered up judgment for the penalty, together with 9*l.* 10*s.* for damages and costs. A writ of enquiry having been executed, damages were assessed at 1115*l.* 18*s.* 4*d.* and costs 40*s.*; and the plaintiff entered up another judgment for those damages, together with 31*l.* 6*s.* 8*d.* for costs; but afterwards entered a *remittitur* on the roll for the costs; held, that the second judgment was erroneous.
Hankin v. *Broomhead.* 3 B. & P. 607
9. It is irregular to rule the plaintiff in error to assign errors before the expiration of the rule to appear to the *scire facias. James* v. *Staples, (in error.)*
6 T. R. 367
10. If the defendant in error from *C. B.* to *B. R.* give an eight-day rule to certify the record, the record may be certified in less time, though the rule expire in vacation: and a *sci. fa. quare executionem non* having been issued immediately upon the record being certified returnable to first day of the following term, the defendant may serve the plaintiff in error on that day with a rule to appear to the *sci. fa.*, and a rule to assign errors.
Samkidge v. *Housley.* 2 T. R. 17
11. It is irregular to hold a defendant to bail in assumpsit, and then to declare in trover.
Tetherington v. *Golding.* 7 T. R. 80
12. An omission in the *ac etiam* part of the writ of the sum for which the defendant is arrested on bailable process is irregular, and he cannot be holden to special bail thereon.
Davison v. *Frost.* 2 E. R. 305

13. If a defendant be served with process by a wrong christian name, and afterwards the plaintiff enter an appearance for him and serve him with notice of declaration by his *right* name, and proceed to judgment and execution, the court will not set aside the proceeding for irregularity merely on the ground that the defendant never appeared, because he ought to have pleaded such misnomer in abatement. But he was afterwards let in to defend on payment of costs, and swearing to a mistake of the practice and to merits.

Oakley q. t. v. *Giles.* 3 E.R. 167

14. If a defendant be served with a writ by a wrong christian name of *W.*, and do not appear to it, the plaintiff cannot file common bail for him in his right name of *E. sued by the name of W.*, nor declare against him *de bene esse* in that form: and the proceedings were set aside for irregularity, after interlocutory judgment signed for want of a plea.

Dring v. *Dickenson.* 11 E. R. 225

15. Defendant was served with a writ styling him "John," he did not appear but plaintif entered a common appearance for him, and declared against him conditionally by the name of "William, sued by the name of John," held irregular.

Greenslade v. *Rotheroe.* 2 N. R. 132

16. If plaintiff take an assignment of the bail bond while the cause is pending, his proceeding upon it after the cause is out of court is not an irregularity.

Pigott v. *Truste.* 3 B. & P. 221

17. If the plaintiff sue the defendant by a wrong christian name, and the defendant appear by his right name, the plaintiff may declare against him by such right name.

Doe v. *Butcher.* 3 T. R. 611

18. *Secùs*, if the plaintiff file common bail for him according to the statute by his right name. 3 T. R. 611

19. Defendant being arrested by the name of *F. H.*, put in bail by the name of *S. H.*: plaintiff then declared thus: "*S. H.* arrested by the name of *F. H.*, was attached to answer, &c." defendant without craving oyer, pleaded in abatement of the writ that his name was *S. H.*; plaintiff having treated this plea as a nullity, and signed judgment accordingly, the court refused to set it aside.

Murray v. *Hubbart.* 1 B. & P. 645.

20. Arrest by the name of *Weston*; declaration *de bene esse* against *Wason*, sue by the name of *Weston*; held regular by C. P.

Symmers v. *Wason.* 1 B. & P. 105

21. If the *latitat* be sued out against the defendant by one christian name and the *alias* by another, and the plaintiff afterwards proceed, the court will set aside the proceedings for irregularity. *Corbet* v. *Bates.* 3 T. R. 660

22. After a writ sued out, and common bail filed, against a defendant by the name of J., it is irregular for the plaintiff to declare against him by the name of R., sued by the name of J. (he not having then appeared), and the defendant may set aside the proceedings before plea.

Delanoy v. *Cannon.* 10 E. R. 328

23. So if the defendant's name be properly inserted in the copy of the process served, but a quite different name in the notice at the foot thereof.

Jones v. *Armytage.* 2 B. & P. 38

24. The defendant must take advantage of an irregularity in the writ before appearance.

Fox & al. v. *Money.* 1 B. & P. 250

25. Taking out a summons before a judge, to stay proceedings on the bail bond is a waiver of an irregularity in the notice of the declaration.

1 B. & P. 842

(And see *ante* V.)

26. Where judgment has gone by default on a promissory note, no irregularity previous to the judgment can be shewn as cause against referring the note to the prothonotary.

Pell v. *Brown.* 1 B. & P. 369

27. If an action be brought on a judgment, which is irregular, the whole proceedings may be set aside in one rule. *Barlow* v. *Kaye.* 4 T.R. 638

(And see *ante* III.)

28. The plaintiff must give notice of his having abandoned a former *committitur*, which is erroneous, before he enters a second, rectifying the mistake.

Topping v. *Ryan.* 1 T R. 227

29. A discontinuance is cured by the appearance of the party by stat. 3 *H.* 8. *c.* 30., in penal as well as civil actions.

Humble v. *Bland* (*in error*) 6T.R.255

30. Serving a rule to discontinue does not of itself discontinue an action; there must be an appointment to tax the costs.

Whitmore v. *Williams.* 6 T. R. 765

31. Though judgment has been irregularly signed without filing common bail for the defendant according to the statute, until after the succeeding term after the writ was returnable, and after the judgment itself has been entered up, yet the defendant having given a *cognovit* is estopped from objecting to the irregularity, if before the time of making the objection the plaintiff has filed common bail *nunc pro tunc*. *Davis* v. *Hughes*. 7 T. R. 206

32. If a rule to set aside proceedings for irregularity with costs be discharged, it must be understood that the rule is discharged with costs. *Reg. Gen.* (K. B.) *M.* 37 *G.* 3. 7 T. R. 82

33. All double pleas must be filed, and not merely delivered to the plaintiff's attorney; though two pleas be pleaded, which separately need only have been delivered.

Harrison v. *Franco*. 2 E. R. 225

34. The rule that final judgment cannot be signed till four days after the return of the *habeas corpora juratorum* does not extend to the case where the term closes before the four days are expired. *Thomas* v. *Ward*. 2 B. & P. 395

35. Bailable process against two, declaration against one only, the Court set aside the declaration for irregularity, though it had been taken out of the office by him against whom it was filed.

Chapman v. *Eland*. 2 N. R. 8.

36. A *testatum capias*, having been made returnable on a day certain instead of a general return day was held irregular. *Inman* v. *Huish*. 2 N. R. 133

37. If plaintiff take a plea out of the office and keep it, he waives any objection to the plea on the ground of its having been pleaded by a new attorney, without any order to change the attorney.

Margerem v. *Makilwaine*. 2 N. R. 509

38. A bill may be filed to warrant a judgment after the want of bill has been assigned an error.

French v. *Cook, in error*. 1 W. P. T. 126

XI. *Judgment of Nonpros, and Nolle Prosequi by Plaintiff.*

1. The stat. 13 *Car.* 2. st. 2. *c.* 2. enabling a defendant to sign judgment of *nonpros* for want of a declaration in due time, extends to all cases. 7 T. R. 26

2. The plaint in replevin being removed by the defendant into the Court of C. P. by *re. fa. lo.* which is filed on the appearance day of the return, and a rule to declare being given, he may sign judgment of *non pros* for want of declaring without demanding a declaration. *James* v. *Moody*. 1 H. B. 291

3. The defendant is bound to search in the office, whether the plaintiff has brought in the issue-roll on the same day that he signs judgment of *nonpros*, even though he may have searched on another day on the expiration of the rule to bring in the roll.

Minus v. *Baxter*. 1 T. R. 16

4. If plaintiff declare against one of two defendants named in his writ, and does not proceed against the other, the latter may sign judgment of *nonpros* immediately. *Roe* v. *Cock*. 2 T. R. 257

5. So if plaintiff serve notice of declaration, or take out a rule for time to declare against one only, without proceeding against the other. 2 T. R. 257

6. Where a plaintiff does not declare, after having obtained time, the defendant may sign judgment of *nonpros without giving a rule to declare*.

Towers v. *Powel & Ux*. 1 H. B. 87

7. And wherever it can appear that the action is not joint, judgment of *nonpros* may be signed by all or any of the defendants. *Butler* v. *Upton*, *H.* 28 *G.* 3. 2 T. R. 259, *n.*

8. Where the cause of demurrer to a declaration was that the counts were improperly joined, the Court of C. P. held that the plaintiff could not enter a *nolle prosequi* as to some, and leave the others remaining. *Rose et Ux.* v. *Bowler & al.* 1 H. B. 108

9. So after demurrer to a declaration of two counts against two defendants, because one of them was not named in the last count, the Court of K. B. held that the plaintiff could not enter a *nol. pros.* on that count, and proceed on the other.

Drummond v. *Dorant*. 4 T. R. 360

10. The Court of C. P. will not allow a defendant to strike out the entry of a judgment of *nolle prosequi* entered by the plaintiff, as to one of the counts of his declaration after it had been demurred to. Nor will it, in that stage of the proceedings, determine a question of costs respecting such a count. *Milliken* v. *Fox & al.* 1 B. & P. 157

11. *Semb.* That judgment on a general demurrer to a plea in bar, the matter of which, even if well pleaded, would be no defence to the action, is to be considered as a judgment by default. 2 H. B. 523

XII. *Judgment of Nonsuit.*

1. A plaintiff cannot be nonsuited without his consent after he has appeared.
Watkins v. *Towers.* 2 T. R. 275

2. If one of two defendants suffer judgment by default, and the other go to trial, the plaintiff cannot be nonsuited as to him, but such defendant must have a verdict if the plaintiff fail to make out his case.
Hannay v. *Smith.* 3 T. R. 662

3. Plaintiff cannot sign judgment for the defendant's refusing to pay 4*d.* for the warrant of attorney when the copy of the declaration is delivered to him. *Oneale* v. *Price.* 4 T. R. 370

4. If a record be ever so erroneous, the plaintiff, who has made default by suffering a nonsuit, can never have a judgment afterwards in his favour.
4 T. R. 436

5. It seems that undertaking by a rule of Court to give material evidence in the county of *A.* in order to fix the *venue* there, does not imply a consent to be nonsuited if the party fail.
2 T. R. 281

6. If the plaintiff, an attorney, by attachment of privilege sue a defendant resident in *Wales* for words spoken there, and lay the *venue* in the *Welch* county (in order that the cause may be tried in the next *English* county), and the judge at the trial certify that the defendant was resident in *Wales*, &c., that fact thus certified may be suggested on the judgment-roll in order to entitle the defendant to enter judgment of nonsuit under stat. 13 *G.* 3. *c.* 51. *Evans* v. *Jones.* 6 T. R. 500

7. An action of covenant for not levying a fine is a personal action within the meaning of the 13 *G.* 3. *c.* 51. § 1. which empowers the judge to certify the defendant's residence in *Wales*, if the verdict be under 10*l.* in order that a nonsuit may be entered.
Davis v. *Jones.* 1 N. R. 267

8. Although notice has been given of a motion for judgment as in case of a nonsuit for not proceeding to trial in due time after issue joined, on which the plaintiff enters into a peremptory undertaking to try, yet *notice must also be given* (under 14 *G.* 2. *c.* 17.) of the like motion for not proceeding to trial in pursuance of the undertaking.
Gooch v. *Pearson.* 1 H. B. 527

9. An affidavit of excuse, however slight, for not proceeding to trial, is sufficient to discharge a rule for judgment as in case of a nonsuit, in a *qui tam*, as well as any other action.
Stone v. *Farey.* 1 E. R. 554

10. The Court of C. P. laid down as a rule, that a peremptory undertaking to try, should of itself be sufficient to induce the Court to refuse a rule for judgment as in case of a nonsuit for not proceeding to trial, on a first default. *Mallet* v. *Hilton.* 2 H. B. 119

11. The defendant in C. P. may rule the plaintiff to enter the issue, and move for judgment as in case of a nonsuit in the same term.
Peeters v. *Throgmorton.* 1 B. & P. 387

12. Where plaintiff withdraws his record after entering it for trial, the defendant may have judgment, as in case of a nonsuit.
Burton v. *Harrison.* 1 E. R. 346

13. After judgment for the defendant on demurrers to certain special pleas, there may be judgment of nonsuit against the plaintiff for not proceeding to trial upon other general pleas on which issues were joined.
Paxton v. *Popham.* 10 E. R. 366

14. Costs for not proceeding to trial and judgment, as in case of a nonsuit, may both be moved for in the same term.
Dorant v. *Rouwelet* alias *Romney.*
2 N. R. 247

15. If plaintiff give notice of trial for the sittings in the term in which issue is joined, and do not proceed to trial accordingly, the defendant may move for judgment as in case of a nonsuit in the succeeding term.
Hay v. *Howell et al.* 2 N. R. 397

16. Where a nonsuit is set aside *upon payment of costs*, such payment is made a condition precedent to the setting aside the nonsuit; and without it the plaintiff cannot proceed to another trial.
Nichols v. *Boyon.* 13 E. R. 185

17. The Court of C. P. will not set aside a nonsuit, on the ground that the case ought to have been submitted to the jury, unless this was desired on the part of the plaintiff at the trial of the cause. *Kindred* v. *Bago.* 1 W. P. T. 10

18. If a defendant dies pending the argument on a point reserved, on which judgment of nonsuit is afterwards given, his representatives are entitled, upon application to the Court, to enter up the judgment of the term next after the trial, that they may get the costs of the nonsuit.
Toulmin v. *Anderson.* 1 W. P. T. 385

XIII. *As to Appearance; and Judgment for Non-appearance,*

(And see *post* XIV.)

1. The general rule respecting signing judgments for non-appearance is, that where by the writ each party has a day in Court, and the defendant may be damnified by not appearing, he may appear and demand the plaintiff, and if the plaintiff does not appear, the defendant is entitled to sign judgment, and to have his costs; and this even though the writ be not returned, as upon a *capias*, *exigent*, or *distringas*.
Davies v. *James*. 1 T. R. 373

2. Where plaintiff files common bail for the defendant on any day between the 2d and 6th *November*, and he is in other respects entitled to sign judgment, it is signed as on the day preceding the essoin day of *Michaelmas* term. *Wansey* v. *Moore*. 5 T. R. 65

3. The return day of a *clausum fregit* and the *quarto die post*, are both reckoned inclusively. There is no difference whether the return day be on a Sunday or any other day; if it is on a Sunday the plaintiff must appear on Wednesday. *Fano* v. *Coken*. 1 H. B. 9

4. The notice to appear annexed to common process must contain *the name* of the defendant on whom it is served.
Worgman v. *Plank*. 1 H. B. 100

5. It is in the discretion of the Court, to put a defendant under terms who moves to have the issues levied under several distringases restored to him on his appearance, according to 10 *G.* 3. *c.* 50. § 4.
Cazalet v. *Dubois*. 1 B. & P. 81

6. Defendant, before the action commenced, quitted the kingdom, leaving another in possession of his house and goods; plaintiff having served a summons to appear at the house, distrained the goods to compel an appearance: and held regular.
Staine & al. (*Sheriff of Middlesex*) v. *Johannot*. 1 B. & P. 200

7. A defendant cannot demand a bill of particulars till after appearance.
Kitchin v. *Blanchard*. 1 B. & P. 378

8. If a defendant accept a declaration, and act as if an appearance has been entered for him, the Court will not afterwards permit him to set aside a judgment for want of an appearance having been entered.
Williams v. *Strahan*. 1 N. R. 309.

9. Where proceedings are by original, plaintiff in error cannot be ruled to appear before the *quarto die post* of the return day of the *alias scire facias*, where *inhil* had been returned.
Sharp v. *Clark*, 15 E. R. 291

XIV. *Judgment for Want of Plea.*

1. On all process returnable in C. P, the last return of any term, if plaintiff declares in *London* or *Middlesex*, and defendant lives within twenty miles of *London*, defendant shall plead within four days after declaration filed or delivered with notice to plead, without any imparlance: provided declaration is filed, *&c.* on the return-day or the day after,—or if the return-day is a *Saturday*, on the *Monday* following.—In the country eight days are given to plead in like manner. *Reg. Gen. C. P. H.* 35 *G.* 3. 2 H. B. 542

2. Judgment may be signed for want of a plea at any time after twenty-four hours from the time of the plea demanded.
Dyche v. *Burgoyne*. 1 T. R. 454

3. But plaintiff cannot sign judgment for want of a plea till the expiration of twenty-four hours after demand of a plea, whether the time for pleading be or be not expired when such demand is made.
Bowles v. *Edwards*. 4 T. R. 118

4. If the defendant however suffer plaintiff to file common bail for him under the statute, the latter may, upon the expiration of the rule to plead, sign judgment for want of a plea, without any demand of plea.
Palk v. *Rendle*, 8 T. R. 465
North v. *Lambert*. 2 B. & P. 218

5. *Aliter*, where the defendant enters an appearance, though he does not take the declaration out of the office.
White v. *Dent*. 1 B. & P. 341

6. So no demand of a plea is necessary, after a judge's order for time to plead.
Pearson v. *Reynolds*. 4 E. R. 571

7. Same point, in C. P. *Baker* v. *Hall*, 1 W. P. T. 538

8. If a declaration be indorsed "to plead in ——," it must be understood to mean within the number of days allowed by the rules of the court.
Hifferman v. *Langelle*. 2 B. & P. 363

9. If a declaration be delivered, indorsed "delivered conditionally," a rule to plead given, and a demand of plea, served, and judgment be signed for want of a plea, the Court will set it

aside as irregular, there being no notice to plead.

Heath v. *Rose.* 2 N. R. 223

10. If defendant, being under an order to plead issuably, plead several pleas, one of which is not issuable, the plaintiff may sign judgment as for want of a plea, though the others be issuable pleas; for the plea which was pleaded in disobedience to the order vitiated all the others.

Waterfall v. *Glode.* 3 T. R. 305

11. Where a defendant, under an order of plea issuably, puts in a sham demurrer to some of the counts in the declaration, and plead issuably as to the rest, the plaintiff may consider the whole as a nullity, and sign judgment as for want of a plea.

Cuming v. *Sharland.* 1 E. R. 411

12. Where a defendant, when under an order to plead issuable, put in a plea, though informal, which went to the substance of the action, the Court held that the plaintiff could not sign judgment, as for want of a plea.

Thelluson v. *Smith.* 5 T. R. 152

13. Not guilty pleaded to an action of debt on a penal statute is not such a nullity as warrants judgment to be signed for want of a plea.

Coppin q. t. v. *Carter.* 1 T. R. 462

14. If a declaration in debt demand 2,000*l.* and contain several counts, each of which states a debt of 224*l.* 7*s.* 4½*d.* and the defendant plead thereto, that he does not owe the said sum of 224*l.* 7*s.* 4½*d.*, the plaintiff may sign judgment for want of a plea.

Macdonnell v. *Macdonnell.* 3B.&P174

15. The plea of *solvit ad diem* should be delivered, and ought not to be entered in the general issue book.

Lockhart v. *Mackreth.* 5 T. R. 661

16. But if the defendant, who is entitled to an imparlance, do enter such a plea in the general issue book before the plaintiff is entitled to a plea, it operates as a waiver of the imparlance, and enables the plaintiff to sign judgment as for want of a plea. 5 T.R. 661

17. A plaintiff having tendered an issue to a plea, and demanded a rejoinder, where the defendant was under terms to rejoin *gratis*, and signed judgment for want of a rejoinder; the Court held the judgment regular; but set it aside without costs, because the plaintiff might have added the *similiter* himself.

Wye v. *Fisher.* 3 B. & P. 443

18. If defendant do not rejoin, the plaintiff may strike out the previous pleadings, and enter judgment as for want of a plea. *Petrie* v. *Fitzroy.* 5T.R.152

19. If a plea be filed before the bail are perfected, it is a nullity, and does not become a good plea by perfecting the bail afterwards.

Venn v. *Calvert.* 4 T. R. 578

20. The irregularity of giving a rule to plead before the delivery of the declaration, is waived by putting in any plea, though a nullity: but such inoperative plea having been put in without authority, by a new attorney for the defendant, without any order to change the attorney, the judgment which had been signed as for want of a plea was set aside.

Perry v. *Fisher.* 6 E. R. 549

21. If an appearance be entered in the name of an agent to the attorney for the defendant, and the plea be delivered in the name of the attorney, and the plaintiff thereupon enter up judgment for want of a plea, the Court will set aside that judgment for irregularity. *Buckler* v. *Rawlins.* 3B.&P.111

22. If after the time for pleading is out, but before judgment signed by the defendant, the Court, on his application, stay proceedings till the plaintiff give security for costs, to be approved by the prothonotary, the plaintiff, though he give security *instanter*, which is accepted by the defendant, is not at liberty to sign judgment before the opening of the office on the next morning.

Decker v. *Thompson.* 3 B. & P. 319

23. The plaintiff is not bound to notice an order for time to plead obtained by the defendant, if it be not drawn up and served; but may sign judgment as for want of a plea after the time when the defendant would have been bound to plead if no such order had been made. *Sedgewick* v. *Allerton.* 7E.R.542

24. Where a sham plea was pleaded of judgments recovered in the Court of Pie-poudre in *Bartholomew* fair, in terms palpably fictitious and out of the regular course, the Court reprobated the practice, and suffered the plaintiff to sign interlocutory judgment as for want of a plea, and made the defendant's attorney pay all the costs occasioned by the plea, and the costs of the rule for correcting the proceedings.

Blewitt v. *Marsden.* 10 E. R. 237

25. Trespass against *B.*, *C.* and *D.* for turning *A.* out of his house, and keeping the house and goods from him; plea, that *A.* had nothing in the said house and goods but "jointly and undividedly with *D.*" Judgment signed for want of a plea, and held right.
Hopgood v. *Wright & al.* 2 N. R. 188

26. Plaintiff is not entitled to sign judgment for want of a plea till the expiration of twenty-four hours after the delivery of a bill of particulars, though the time for pleading be out, and a demand of a plea given, above twenty-four hours before that time..
Ramsey v. *Reay* (*Ld.*) 2 N. R. 361

XV. *Judgment Criminal.*

1. Where a defendant is brought up for sentence on any indictment or information, *after verdict*, the defendant's affidavits shall be first read, and then those for the prosecution; after which the defendant's counsel shall be heard, and lastly the counsel for the prosecution. *R.* v. *Bunts, Reg. Gen. M.* 29 *G.* 3 2 T. R. 683

2. Where a defendant is brought up for sentence *after judgment in default*, the prosecutor's affidavits shall be first read, then the defendant's; after which the counsel for the prosecution shall be heard. and lastly the defendant's counsel. 2 T. R. 689

3. But if no affidavits be produced, the defendant's counsel shall be heard first, and then the counsel for the prosecution. 2 T. R. 683

4. After conviction on a criminal information, to which objections were taken, the defendant must stand committed pending the consideration of the judgment, unless the prosecutor expressly consent to his standing out on bail.
R. v. *Waddington.* 1 E. R. 159

5. After judgment on the defendant for a libel, the Court refused to make an order on the prosecutor to deposit the original libellous papers with the officers of the Court.

6. Besides the common four-day rule on a defendant in misdemeanor to join in demurrer to his plea, there must be a peremptory rule, giving him a certain day in the discretion of the Court, without which judgment cannot be signed against him.
R. v. *The Hon. R. Johnson.* 6 E. R. 383

XVI. *Oyer.*

1. *Oyer* of a record is never granted. 1 T. R. 149

2. As the practice of the Court of K. B. is not to grant *oyer* of an original writ; and yet a plea in abatement for want of an addition to a defendant, in such writ is bad without *oyer:* the effect is to prevent such plea from being pleaded, and therefore if pleaded the Court will quash it.
Deshons v. *Head.* 7 E. R. 383

3. The party who is to give *oyer* of a deed, is allowed two days for that purpose, exclusive of the day on which it is demanded.
Page v. *Divine.* 2 T. R. 7

4. The defendant has *as many pleading days* to plead, after *oyer* is granted, as he had when it was demanded.
Webber v. *Austin.* 8 T. R. 356

5. *Oyer* may be prayed any time before the expiration of twenty-four hours after the *demand* of a plea though the *rule* to plead be out.
Sparkes v. *Simpson.* 2 B. & P. 370

6. The defendant having pleaded letters patent to a *quo warranto* information, and made a profert of them, *oyer* was refused in another term from that in which the profert was made.
R. v. *Amery.* 1 T. R. 149

7. If defendant, after craving *oyer* of a deed, do not set forth the *whole* deed, the plaintiff may sign judgment as for want of a plea; or the Court will quash the plea. *Wallace* v. *Duchess of Cumberland.* 4 T. R. 370

8. Where the defendant, in an action of debt on bond, after craving *oyer*, and setting it out truly, pleaded payment, on which the plaintiff took issue, and served defendant's attorney with a rule to abide, *&c.* and gave notice of trial; and afterwards defendant returned the paper-book, setting out a false *oyer* of the bond, and pleading as before, on which the plaintiff inrolled the true condition, and demurred; the Court ordered all the pleadings to be struck out, and that plaintiff should have judgment, and that the defendant's attorney should pay all the costs.
Ferguson v. *Mackreth.* *H.* 24 *G.* 3.
B. R. cited. 4 T. R. 371, *n.*

XVII. *Particulars of Plaintiff's Demand.*

1. If a bill of particulars state the plaintiff's demand to be for goods sold and delivered to the defendant, no evidence can be received of goods sold by the defendant as agent for the plaintiff.
Holland v. *Hopkins.* 2 B. & P. 243
2. If a plaintiff by his bill of particulars confine his demand to one count of his declaration, and defendant pay money into Court generally, the plaintiff is not at liberty to apply the money so paid in, to any of those counts on which he is precluded from giving evidence by his bill of particulars.
2 B. & P. 243
3. An order for a bill of particulars does not suspend the time for pleading, and therefore plaintiff may sign judgment immediately after delivering the particular, if the time for pleading be then out.
Hifferman v. *Langelle.* 2 B. & P. 363
4. In an action of assumpsit for non-performance of a contract for the sale of a house, with counts to recover back the deposit, the plaintiff having in his first count alleged that the defendant, who was to make a good title, had delivered an abstract which was "insufficient, defective and objectionable," the Court obliged the plaintiff to give a particular of all objections to the abstracts arising upon matters of fact.
Collett v. *Thompson.* 3 B. & P. 246
5. If a first particular be delivered under a judge's order, and the plaintiff deliver a second particular without an order, he cannot give evidence upon any claim contained in the second particular, which was not included in the first.
Brown v. *Watts.* 1 W. P. T. 353
6. It is a great contempt to deliver under an order a particular as general as the declaration. 1 W. P. T. 353
7. An erroneous date to a bill of particulars of plaintiff's demand, is not material, where the date cannot mislead. *Milwood* v. *Walter.* 2 W. P. T. 224

XVIII. *Plea, demanding; Rule to plead and to abide by Plea.*

1. A demand of a plea before the defendant has appeared, or the plaintiff filed common bail for him, is a nullity.
Cooke v. *Raven.* 1 T. R. 635
2. Where the defendant is joined with his wife in the writ, he may enter an appearance for himself only; and in such case the plaintiff cannot sign judgment for want of a plea, without demanding a plea.
Clark v. *Norris & Ux.* 1 H. B. 235
3. A demand of a plea may be made at the time of delivering the declaration.
Edmonton (*Churchward.*) v. *Osborne.* 6 T. R. 689
4. If a plea be demanded on a *Saturday*, the defendant has twenty-four hours to plead after the demand exclusive of *Sunday*.
Solomons v. *Freeman.* 4 T. R. 557
5. No demand of a plea is necessary when the defendant is in custody of a sheriff.
Wilkinson v. *Brown.* 6 T. R. 524
6. Nor is it necessary, in cases where the plaintiff sues the defendant in the custody of a sheriff, and the defendant, without notice to the plaintiff, procures himself to be removed to a different custody. 6 T. R. 524
7. If a prisoner be prevented from justifying bail by the plaintiff desiring further time to enquire into their sufficiency, he is from the time of his notice of justification entitled to a demand of a plea before judgment can be signed against him.
Davies v. *Chippendale.* 2 B. & P. 367
8. A summons for further time to plead not attended by the party taking it out, does not waive the necessity of a rule to plead.
Decker v. *Shedden.* 3 B. & P. 180
9. The rule to plead to an amended declaration must be a four days' rule.
Barton v. *Moore, one, &c.* 8 T. R. 87
10. Though a rule to plead expires on a *dies non juridicus*, the defendant is bound to plead on or before that day, and if he does not, judgment may be signed on the next day.
Mesure v. *Britten.* 2 H. B. 616
11. On a four-day rule for bail in *scire facias* to appear and plead, in term, *Sunday*, though an intermediate day, is not to be reckoned.
Wathen v. *Beaumont.* 11 E. R. 271
12. The rule for judgment must have four clear days, exclusive of the first and last, and of *Sunday*, before judgment entered.
Roberts v. *Stacey.* 13 E. R. 21
13. After a rule to abide by a special plea, or plead such other plea as the defendant will abide by, he can only plead the general issue.
Hare v. *Lloyd.* 1 T. R. 693: *Prout* v. *Dewar, E.* 27 *G.* 3. 1 T. R. 693, n

14. But after such a rule the defendant may plead the general issue, and give notice of set-off. *Cockran* v. *Robertson*, E. 27 G. 3. 1T. R. 693, *n*.

XIX. *Plea issuable; Pleas done in Continuance, &c.*

1. The defendant cannot put in a special demurrer when he is under terms of pleading issuably.
Berry v. *Anderson*. 7 T. R. 530
2. A defendant who is under terms to plead issuably, is not at liberty to take advansage of any objections upon special demurrer, of which he could not have availed himself upon general demurrer.
Bell v. *Da Costa*. 2 B. & P. 446
3. Under a judge's order to plead issuably, the defendant can only put in a plea which goes to the merits.—The plea of *alien enemy* is not such a plea.
Simeon v. *Thompson*. 8 T. R. 71
4. Under the conditions of pleading issuably and taking short notice of trial, if a declaration is delivered after the sittings have begun, but so early that there would be time for notice of trial for the adjournment day, upon the defendant pleading *instanter*, that is, within twenty-four hours, he must so plead.
Price v. *Simpson*. 1 W. P. T. 345
5. Defendant, after a verdict against him, obtained a rule for a new trial, which, after argument on a subsequent day, was discharged; he then pleaded a plea *puis darrein continuance, intitled of the term generally;* and the Court refused to order a special memorandum of the day when it was filed, under these circumstances.
Lovell v. *Eastaff*. 3 T. R. 554
6. If a plea *puis darrein continuance* be filed and verified on oath, the Court cannot set it aside on motion, but are bound to receive it. 3 T. R. 554

XX. *Time to Plead, and Rule for.*

1. If a declaration be filed on the *essoin* day, with the usual notice indorsed, the defendant must plead in eight days from that time; although, by the rules of the office, no person is allowed to search for a declaration till the first day in full term.
Hutchinson v. *Best*. 1 W. P. T. 22
2. In an order to enlarge the time for pleading, the Court of C. P. held that the time was reckoned inclusive of the date of the order, but exclusive of the day when it expired.
Kay v. *Whitehead*. 1 H. B. 35
3. But in a subsequent case it appears that the officers of the Court considered that the first and last days are both to be reckoned inclusively.
Freeman v. *Jackson*. 1 B & P. 479
4. In trover for goods where the defence is that they were sold by the plaintiff, the Court will give the defendant time to plead, in order that he may obtain a discovery from the Court of Chancery in the mean time.
Whitter v. *Cazclet*. 2 T. R. 683
5. After a defendant has obtained an order for time to plead on the terms of pleading issuably, he cannot plead the statute of limitations, or any other plea which does not go to the merits: and if he plead such a plea, the Court will set it aside on motion.
Stadholme v. *Hodgson*. 2 T. R. 390
6. But this case was afterwards overruled, and the Court held that a defendant might in such case plead the general issue, and the statute of limitations. *Rucker* v. *Hannay*. 3T.R.124
7. And the Court of C. P. refused to restrain a defendant from pleading the statute, on setting aside a regular interlocutory judgment. *Maddocks* v. *Holmes & al*. 1 B. & P. 228
8. Both in K. B. and C. P. a plea of tender may now be pleaded after a judge's order for time to plead.
Noone v. *Smith*. 1 H. B. 369
9. When time to plead has been obtained, if the defendant plead and give a rule to reply before the expiration of such time, the rule to reply will be of no avail unless he give notice of his plea. *Gandy* v. *Barrowdale*. N. R. 273

XXI. *Signing Pleadings.*

1. In C. P. a replication *taking* issue on a plea of payment to debt on an annuity-bond must be signed by a serjeant. *Ellis* v. *Govey*. 1 B. & P. 469
2. Where a plea is signed by a serjeant, the replication should be signed also: though to this rule a *similiter* is an exception; for no judgment is required in merely joining issue. 1 B. & P. 469
3. A demurrer must be signed by a serjeant.
Douglas v. *Child*. 2 B. & P. 336, *n*.
4. So must a joinder in demurrer; for a serjeant ought to be met by a serjeant. *Broker* v. *Simpson*. 2B. & P. 336
Douglas v. *Child*. *ib. n*.

XXII. *Prisoner, Proceedings against.*

1. A plaintiff need not declare against a prisoner until the end of the term next after the return of the writ, even though there was time, in the term in which the writ was sued out, to have made the writ returnable in that term. *Richardson* v. *Richardson.* 6 T. R. 547

2. A copy of the declaration must be *delivered*, as well as the declaration entered, before the end of the term next after the return of the writ.

Blyth v. *Harrison.* 1 B. & P. 535

3. The defendant having surrendered in discharge of his bail in K. B. removed himself by *habeas corpus* into the *Fleet*, and plaintiff declared against him there after the end of the second term after the writ was returnable; a judgment of *nonpros* signed afterwards was irregular.

Sherson v. *Hughes.* 5 T. R. 35

4. If a person, having privilege of parliament be in the King's Bench Prison, a declaration may be filed against him as being in custody of the marshal, and no summons need be issued against him. *Jackson* v. *Mackreth.* 5 T. R. 361

5. A summons is generally issued to bring the party into court; but it is unnecessary when the defendant is already in the custody of the marshal. 5 T. R. 362

6. The declaration need not be delivered to a prisoner personally, or to the gaoler, unless where he is in custody at the suit of the same plaintiff for the same cause of action.

Robertson v. *Douglas.* 1 T. R. 191

7. A declaration against a prisoner may be delivered in the vacation.

Heron & al. v. *Edwards.* 8 T. R. 643

8. The rule of *E.* 5 *W.* and *M. Reg.* 2. requiring the affidavit of the delivery of the declaration to be filed within 20 days of the delivery does not extend to the case of a declaration delivered by way of detainer.

Davis v. *Darenport.* 2 B. & P. 72

9. The delivery of a declaration against a prisoner, though within two terms, is a nullity if there were no bill filed before; and he is entitled to his discharge under the above rule of court.

Nowell v. *Bingham.* 4 E. R. 16

10. If a declaration be delivered against a prisoner as such, after he has obtained a *supersedeas*, it is irregular: but he cannot take advantage of the irregularity unless he apply to the court in due time.

Gehegan v. *Harper.* 1 H. B. 251

11. If a defendant in custody employ an attorney merely for the purpose of putting in bail, delivery of declaration to that attorney is not sufficient.

Dent v. *Halifax.* 1 W. P. T. 493

12. The stat. 48 *G.* 2. 3. *c.* 149. *sched.* II. requiring an office copy of the declaration to be written in the usual and accustomed manner, on which the duty of 4*d.* per sheet is imposed; and it not having been the practice to write such copies on *both sides* of the stamped sheet of paper; held that an office copy so written and delivered to a prisoner was irregular, and entitled him to be discharged out of custody.

Champneys v. *Hamlin.* 12 E. R. 294

13. A prisoner who is supersedeable for want of filing a bill against him in time, waives the irregularity by afterwards pleading.

Pearson v. *Rawlings.* 1 E. R. 77

14. When a prisoner pleads out of time, he must give the plaintiff notice of his plea. *Thomas* v. *Prichard.* 4 T. R. 664

15. In general a prisoner need not give notice of his having filed a plea, but when he pleads at an earlier time than by the rules of the court he is compellable to plead, he must give notice.

Rusholm v. *Chapman.* 5 T. R. 473

16. And if he do not, the plaintiff may sign judgment as for want of a plea.

Parkinson v. *Thompson.* 8 T. R. 596

17. Persons charged with offences against the excise laws (who by stat. 26 *G.* 3. *c.* 77. § 18., and 35 *G.* 3. *c.* 96., are to be committed to gaol in case they cannot find bail, and in whose names an appearance and the plea of not guilty is to be entered within a time to be limited by this court, to any indictment or information exhibited against them for the same, unless they appear and plead, are allowed by rule of court six days to enter an appearance and plead in case they are confined within forty miles of *London*, and eight days if above forty miles.

Reg. Gen. T. 35 *G.* 3. 6 T. R. 400

18. If a plaintiff do not proceed to trial or judgment within three terms against the defendant (a prisoner), the latter is not entitled to be discharged until the expiration of the third term.

4 T. R. 664

19. The rule of Court of Hilary, 26 *G.* III. superseding a prisoner, against whom plaintiff shall not proceed to trial or final judgment within three terms after declaration delivered, does

not attach in a case where there are two defendants one of whom suffered judgment by default, and the other pleaded to issue, the trial of such issue being had within the third term; though the costs were not taxed nor final judgment in fact signed till after that term; but then entered according to the course of the court as of that term. *Wrigleworth* v. *Wright & al.* 13 E. R. 167

20. When a defendant surrenders in discharge of his bail in the vacation *after verdict* against him, the plaintiff must charge him in execution within the two terms next following such vacation. *Smith* v. *Jefferys.* 6 T. R. 776

21. But when he surrenders in the vacation *after judgment*, the term in which the judgment is sigued is reckoned as one of the two terms within which the plaintiff must charge him in execution. 6 T. R. 777

22. If the plaintiff's attorney sign judgment, and file the committitur piece with the clerk of the judgments within the second term after trial had and verdict obtained against a prisoner, that is a sufficient *charging him in execution within two terms*, pursuant to the rule of court of *Hilary*. 26 *G.* 3. though the final judgment and the committitur be not entered of record by the officer of the court till the continuance day after such second term; provided such entries be then completed.

Pearson v. *Rawlings.* 1 E. R. 405

23. Every committitur of a judgment against a prisoner shall be filed with the clerk of the docquets on or before the last day of the term, in which the prisoner is charged in execution; and the clerk shall enter the committitur on the judgment roll within four days next after the end of such term, exclusive of the last day of the term; unless the last of such four days, be *Sunday*, and then within five days, &c. and in default thereof the prisoner shall be discharged.

Reg. Gen. East. 41 *G.* 3. 1 E. R. 410

24. By the rule of court, *Hil.* 26 *G.* 3., if there be a *trial* against a prisoner, he is supersedable, unless charged in execution within two terms afterwards. If there be *final judgment* against him, *without trial*, which is what is there meant by *final judgment*), then he is supersedable, unless charged in execution within two terms after such final judgment; inclusive of the term of trial or final judgment respectively.

Heaton v. *Wittaker.* 4 E. R. 349

25. A creditor may lawfully enter a detainer against his debtor, who is in fact resident within the walls of the *Fleet*, though he be not there by compulsion.

Wilkinson v. *Jaques.* 3 T. R. 392

26 A person in custody under an attachment for non-payment of costs may be charged with an execution in a different action. *Bonafous* v. *Schoole.* 4T.R.316

27. A prisoner, after judgment against him may, notwithstanding the allowance of a writ of error, be charged in execution; as he would otherwise be supersedable.

Fisher v. *M'Namara.* 1 B. & P. 292

28. The court will not discharge a prisoner out of execution, because the judgment against him is not docketted and entered upon the rolls of the court.

Pariente v. *Castle.* 2 B. & P. 163

29. A prisoner under criminal process in the house of correction cannot be brought up by *habeas corpus ad respondendum*, for the purpose of being charged with a declaration on a bailable writ, and re-committed to his former custody so charged; for the court have no power to make a gaoler of such prison liable for the escape of a prisoner on civil process.

Brandon v. *Davis.* 9 E. R. 154

30. Aliter in the case of a sheriff or gaoler of the court. 9 E. R. 154

XXIII. *Process, Service of, &c.*

1. A defendant who complains of irregularity in process must if he has an an opportunity apply to have it set aside before the plaintiff has taken any further steps in the cause.

Downes v. *Witherington.* 2 W. P. T. 243

2. The *custos brevium* is to indorse on every writ on what day and at what hour it is filed.

Reg. Gen. T. 33 *G.* 3. 3 T. R. 787

3. A bill of *Middlesex* may be returnable the same day that it is sued out.

Oxlade v. *Davidson.* 4 T. R. 610

4. The court refused to set aside a bill of *Middlesex*, which was to answer plaintiff in a plea of *debt*, instead of *trespass*. *Barber* v. *Lloyd.* 2 T. R. 513

5. The court will quash a writ for irregularity if it have an informal return, although the day of the return be equally certain as in the common form.

Reubel v. *Preston.* 5 E. R. 291

6. It is irregular if a *capias* be served after the date of the return, and if there be not 15 days between the *teste* and the return.
Whale v. *Fuller*. 1 H. B. 222
7. But if the defendant take the declaration out of the office, he thereby waives all preceding irregularity. 1 H. B. 222
8. If a defendant be *arrested* after the writ is returnable, the officer cannot legally detain him (though for the shortest time) until the writ be continued. *Loveridge* v. *Plaistow*. 2H.B.29
9. On all writs of distringas returnable on the last day of term, plaintiff may, at the rising of the court, move to increase issues on the *alias* or *pluries*, to be thereupon issued next day; or to sell the issues where they have been levied on such *distringas*. *Reg. Gen. C. P. T.* 38 *G.* 3. 1 B. & P. 312
10. After a summons and distringas issued against a privileged defendant in the county where the action is brought, but in which he did not reside, and of which process he had no notice, and returns of *non est inventus* and *nulla bona*, a *testatum distringas* may regularly issue into the county in which he resides and has property, without any new summons in such county; but the sheriff ought not to levy more than 40*s*. under such *testatum distringas* in the first instance, according to the usual course.
Bloxam v. *Surtees*. 4 E. R. 162
11. If a plaintiff sues a defendant who is out of the country, for a debt contracted here by his wife in his absence, and proceeds by *distringas*, the court will order the issues to be restored and set aside that writ.
Greaves v. *Stokes*. 1 W. P. T. 485
12. But a plaintiff who did not know at the time of giving credit, that the defendant was out of the realm, may proceed notwithstanding his absence, to compel an appearance by *distringas*. So if the defendant, residing abroad, carries on trade in England.
Gurney v. *Hardenberg*. 1 W.P.T. 487
13. By the long established and recognized practice of *B. R.* a writ of *capiae*, with a *non omittas* clause, may issue in the first instance, and be executed by the sheriff within a particular liberty (such as the honor of *Pontefract* in the county of *York*), the bailiff of which has the execution and return of writs, without a prior writ of *latitat* first issued, and a return made by the sheriff of *mandavi ballivo qui nullum dedit responsum*.
Carret v. *Smallpage & al.* 9 E. R. 330
14. Only the defendant or defendants in one action can be included in a bailable writ: *secùs* if the writ be not bailable. *Holland* v. *Johnson*. 4 T. R. 695
15. Affidavit of defendant against *A. capias* against *A.* and *B.* and declaration against *A.* only, by whom bail was put in, held regular.
Forbes v. *Phillips*. 2 N. R. 98
16. Proceedings set aside because the bill of *Middlesex* was served in the city of *London*. *Borman* v. *Bellamy*. 1 T. R. 187
17. So a *capias* directed to the sheriff of *Middlesex* held bad when served in *London*. *Willis* v. *Pendrill*. 2 N.R. 167
18. But the court refused to set aside the proceedings merely because the defendant was served with a *latitat* in *Middlesex*; service is sufficient if it gives personal notice to the party, provided it be not a bailable process.
Kelly v. *Shaw*. 6 T. R. 74
19. So service of a writ (directed to the sheriff of *Northumberland*) in *Newcastle upon Tyne*, was held good.
Busby & al. v. *Fearon*. 8 T. R. 235
20. Service of a *latitat* at eight o'clock in the evening of that day when it is returnable is good, though the declaration be left in the office in the course of the same day. 1 T. R. 191
21. So, in the case of *Ward* and *Wilkinson*, the court refused to set aside the proceedings, though the notice of declaration was not served till half after ten at night. 1 T. R. 192, *n.*
22. Service of notice of a declaration on a *Sunday* is bad, though the defendant accept it knowing it to be irregular.
Morgan v. *Johnson*. 1 H. B. 628
23. So is service of a *latitat*, though the defendant afterwards applied to settle the debt, and do not take the objection till served with a rule to plead.
Taylor v. *Philips*. 3 E. R. 155
24. Service of notice of plea filed on a *Sunday* is void, by construction of the stat. 29 *Car.* 2 *c.* 7. § 6. which avoids all process, &c. served on that day.
Roberts v. *Monkhouse*. 8 E. R. 547
25. It is a matter of public policy that no proceedings of the nature described in the statute should be had on a *Sunday*; their irregularity, therefore, cannot depend on the assent of the party

to waive the objection to proceedings, absolutely avoided by the statute.
3 E. R. 156

26. Where there is an agent in town all notices are given to him, and are not sent into the country. *Buller* J.
Griffiths v. *Williams*. 1 T. R. 710
But see *Hayes* v. *Perkins*. 3 E. R. 568

27. The plaintiff, after suing out common process, may sue out a bailable writ for the same cause, and arrest the defendant, before he discontinues the first action.
Bishop v. *Powell*. 6 T. R. 616

28. *Aliter* if the first writ be bailable.
6 T. R. 616

29. The *English* notice to appear, required by 5 *G.* 2. *c.* 27. § 4. must be added to all common process where the defendant is not holden to bail, whether the cause of action do or do not amount to 10*l.*
Lumley q. t. v. *Fitz*. 7 T. R. 337

30. This *English* notice is to be on the copy of the process, and not on the writ itself: and the service of such copy without the notice is irregular and will be set aside: though the court discharged a rule for quashing the writ itself on this account.
Lloyd v. *Maurice*. 9 E. R. 528

31. Notice subscribed to process to appear on the *quarto die post*, is good.
Sumner v. *Brady & al.* 1 H. B. 630

32. But the court have since ordered that the *return-day* should be inserted; which they said was the practice previous to the case of *Sumner* v. *Brady*, and more conformable to the statutes.
Rushton v. *Chapman*. 2 B. & P. 540

33. If the *English* notice at the foot of common process require the defendant to appear at a return day in an impossible year, it is not such an irregularity for which the court will set aside the proceedings.
Steel v. *Campbell*. 1 W. P. T. 424

34. It is not necessary to add the name of the filazer to a common *capias* in C. P. *Frost* v. *Eyles & al.* 1 H. B. 120

35. If the plaintiff prove a cause of action before the bill filed, though after the writ sued out, it is sufficient as well in the case of bailable as common writs. *Best* v. *Wilding*. 7 T. R. 4

36. The plaintiff is entitled to recover for goods sold and delivered upon credit for a certain time; it appearing by the special memorandum that the bill was filed on a day subsequent to the expiration of the credit, though the writ appeared to have issued before. But if the defendant were actually arrested before the credit expired, *semble*, that he has his remedy in damages.
Swancott v. *Westgarth*. 4 E. R. 75

37. Evidence of an account stated, whereby the defendant admitted a certain balance due to the plaintiff, is not done away, but confirmed by evidence of a foreign judgment recovered by the plaintiff for the same sum, with a stay of execution for six months to enable the defendant to prove a counter demand, if he had any: and the plaintiff not having declared till after that period, it was held no objection that the writ was sued out and the defendant arrested before.
Hall v. *Odber*. 11 E. R. 118

38. A judge's order "that upon payment of debt and costs by a certain day all proceedings should be stayed," is only *conditional* on the defendant.
Fricker v. *Eastman*. 11 E. R. 319

39. After possession once given under a writ of possession, the plaintiff cannot sue out another writ of possession, though he be disturbed by the same defendant, and though the sheriff have not yet returned the former writ. *Doe d. Pate* v. *Roe*. 1 W. P. T. 55

40. The instructions called a *præcipe*, given by the attorney to the *filazer*, are not process in the cause; and it is not necessary that they should contain a clause of *ac etiam*.
Boyd & al. v. *Durand*. 2 W. P. T. 161

41. Notice of motion for the next day served after nine o'clock at night is not sufficient. 2 W. P. T. 48

XXIV. *Trial; Proceedings to; and as to Notice thereof, &c.*

1. The plaintiff is not bound by the practice of the Court of K. B. to give notice of trial till the term after that in which issue is joined.
Hall v. *Buchanan*. 2 T. R. 734

2. It was said by the Court of C. P. that where issue is joined early in a term, (*e. g.* within the first six days), notice of trial must be given in the same term.
Frampton v. *Payne*. 1 H. B. 65

3. Where issue is joined in the vacation, the Court of C. P. allows the plaintiff the whole of the next term to proceed to trial in.
Baker v. *Newman*. 1 H. B. 123

4. To support, in the next term after that in which issue is joined, a rule for judgment as in case of a nonsuit, for not proceeding to trial, the affidavit must state, that issue was joined early enough in the preceding term for the plaintiff to have proceeded to trial in that term. But in the third term a general affidavit, stating that issue was joined in the former term, is sufficient. *Woulfe* v. *Sholls.* 1 H.B.282

5. And in a subsequent case under such general affidavit, the Court held that judgment, as in case of a nonsuit for not proceeding to trial, could, in no case, be moved for till the *third* term after that in which issue is joined.

Da Costa v. *Ledstone.* 2 H. B. 558

6. If issue in a *London* cause be joined early enough in a term to enable the plaintiff to give notice of trial for the sittings after that term, the defendant is not entitled to judgment as in case of a nonsuit for not proceeding to trial unless the plaintiff has in fact given notice of trial.

Munt v. *Tremamondo.* 4T.R.557

7. If one of several defendants reside within forty miles of *London*, it is not necessary to give the ten days' notice of trial required by stat. 4 *G.* 2. *c.* 17. § 3. *Per Ashurst* J. in *Perry* v. *Jackson.* 4 T. R. 520

8. Where the defendant residing in town at the issuing of the writ changes his residence permanently to the country, at the distance of above forty miles from town, before the delivery of the issue, he is entitled to fourteen days' notice of trial.

Spencer v. *Hall.* 1 E. R. 688

9. Where the defendant was residing in *London* before and at the commencement of the action, eight day's notice of executing a writ of inquiry is sufficient, though the defendant had in the intermediate time permanently removed above 40 miles from *London*, (to *Tortola*); if he did not give the plaintiff previous notice of such removal.

Rockfort v. *Robertson.* 12 E. R. 427

10. The venue was in *London*, and verdict for plaintiff without defence, which was set aside because only eight days' notice of trial was given, the defendant residing in *India*.

Douglas v. *Ray.* 4 T. R. 55

11. One who was residing at an hotel in *London*, from the time of his arrest till he was served with notice of executing the writ of inquiry, was holden not entitled to more than eight days' notice in a town cause, though his general residence (his home) was above 40 miles from town.

Lloyd v. *Hooper.* 7 E. R. 624

12. Where a plaintiff has carried a record down for trial once, the Court of K. B. refused to give judgment, as in case of a non-suit, for not carrying it down a second time, even though it were made a *remanet* the first time. The defendant should have carried the record down by proviso.

Mewburn v. *Langley.* 3 T. R. 1

13. So, where a plaintiff had once proceeded to trial, the Court of C. P. refused a rule for judgment, as in case of a nonsuit, for not proceeding to a new trial.

Porzelius v. *Maddocks.* 1 H. B. 101

14. If a cause be made a *remanet*, no new notice of trial need be given: *aliter* where the trial of the cause is put off to the next sittings or assizes by rule of court (B. R.)

Jacks v. *May.* 8 T. R. 245

15. And even when a plaintiff gives a peremptory undertaking to try at the next sittings or assizes, there also a new notice of trial must be given. *Dict. p. Cur. K. B.* 8 T. R. 246, *n.* *Monk* v. *Wade, T.* 29 *G.* 3. *cited, ib.*

16. Although the plaintiff has undertaken peremptorily to proceed to trial at the next assizes, yet the defendant is not bound to attend and be prepared with witnesses, counsel, *&c.* without having had *notice of trial.*

Ifield v. *Weeks & al.* 1 H. B. 222

17. Nor will the prothonotary allow him the cost of such attendance and preparation, though he obtain judgment as in case of a nonsuit, on account of the plaintiff's not proceeding to trial. 1 H. B. 222

18. The court will permit a defendant to carry a record of an issue, directed by Chancery, down to trial, on a suggestion that the plaintiff intends to delay. *Humpage* v. *Rowley.* 4T.R.767

19. Where the defendant carries down the record by proviso, it is sufficient if he obtain the usual rule for trial by proviso any time before trial, even though it be obtained after he has given the plaintiff notice of trial.

King v. *Pippet.* 1 T. R. 695

20. A defendant in a case where the king is party cannot carry down the *nisi prius* record to trial by proviso.
R. v. *Dyde.* 7 T. R. 661
R. v. *M'Leod.* 2 E. R. 202
And see a *qu.* as to prosecutions by private persons; and a general note on the trial by proviso. 2 E. R. 206, *n.*

21. Upon an indictment for perjury removed into *B. R.* by certiorari, if the prosecutor give notice of trial to the defendant, and withdraw his record without countermanding his notice in time, he shall pay costs to the defendant. *R.* v. *Bartrum.* 3 E. R. 269

22. Where short notice of trial is to be accepted in country causes, such notice shall be given at least four days before the commission-day, one day exclusive, and the other inclusive.
Reg. Gen. E. 30 *G.* 3. 3 T. R. 660

23. It is not necessary to give a term's notice of trial after proceedings in the cause have been suspended for a year, if within the year the plaintiff gave notice that he should proceed again; but the common notice of trial is sufficient. *Richards* v. *Harris.* 3 E. R. 1

24. The granting of a trial at bar is in the discretion of the court, and must depend upon the particular circumstances of the case.
R. v. *Amery.* 1 T. R. 363

25. The court of C. P. will not permit the mise joined in a writ of right, to be tried by a jury instead of the grand assize, though both parties desire it.
Galton v. *Harvey.* 1 B. & P. 192

26. Where a fair trial cannot be had in the county where the matter arises, trial will be awarded in the next *English* county where the king's writ of *venire* runs. 1 T. R. 363

27. Therefore where the action arose in the city of *Chester*, and a fair trial could not be had there, the *venire* was awarded into the county of *Salop*.
1 T. R. 363

28. But in a subsequent case, the court declared that this opinion was founded on a mistake; and, upon a suggestion entered by leave of the court upon the roll that a fair and impartial trial could not be had in the county of the city of *Chester*, the court awarded the trial to be had *in the adjoining county-palatine.*
R. v. *St. Mary on the Hill, Chester.* 7 T. R. 735
(And see the notes there.)

29. *Chester* is one of the places excepted out of stat. 38 *G.* 3. *c.* 52. for regulating trials in towns corporate, *&c.* 7 T. R. 735, *n.*

30. Notice having been given for the trial of a cause at *Monmouth*, which arose in *Glamorganshire*, as being in fact the next *English* county since the stat. 27 *H.* 8 *c.* 26. § 4. though *Hereford* be the common place of trial; the court refused to set aside the verdict as for a mis-trial, on motion; the question being open on the record.
Ambrose v. *Rees.* 11 E. R. 370

31. The court (of C. P.) will not put off a trial at the instance of the defendant, on account of the absence of a material witness, if he has conducted himself unfairly, or been the cause of any improper delay.
Saunders v. *Pittman.* 1 B. & P. 33

32. A defendant indicted in K. B. for misdemeanours committed by him in the West Indies in a public capacity under stat. 42 *G.* 3. *c.* 85. is not entitled under that statute, upon an affidavit in the common form for putting off a trial upon the absence of a material witness, to put off his trial till return made to writs of mandamus to the courts, &c. abroad, to examine witnesses; which are directed to be issued in such cases at the *discretion* of the court of B. R.; but he must lay before the court such special grounds by affidavit, as may reasonably induce them to think that the witnesses sought to be examined are material to his defence. But the prosecutor in such case is of course entitled to writs of mandamus for the like purpose.
R. v. *Jones.* 8 E. R. 31

33. The court (of C. P.) will not, by putting off a trial, or other indirect means, compel a party to consent to a commission for the examination of witnesses in *Scotland*. Where contradictory verdicts have been found on a policy of insurance, and a third action brought against another under-writer, the court will not put off the trial to enable him to obtain a commission from a court of equity for the examination of witnesses in *Scotland*, to the same facts which were given in evidence on the last trial; at least if he has obtained time to plead on the usual terms. *Calland* v. *Vaughan.* 1 B. & P. 210

34. That court refused to put off a trial on account of the absence of a material witness, by whose evidence the defence of slavery was to be established.
Robinson v. *Smyth.* 1 B. & P. 454

35. If witnesses are absent, and their return is not immediately expected, the court will not require of the plaintiff a peremptory undertaking to proceed to trial, as the condition of discharging an application for judgment as in case of a nonsuit. *Gardner* v. *Moses.* *Watson* v. *Moses.* 1 W. P. T. 118

36. The affidavit of an attorney's clerk to put off a trial must state that he is particularly acquainted with the circumstances of the cause, and has the management of it. *Sullivan* v. *Magill.* 1 H. B. 637

37. If a defendant die on the night before the trial of a cause at the sittings in term, a verdict obtained in such cause, and the judgment entered up thereon, will be set aside upon application to the court. *Taylor* v. *Harris.* 3 B. & P. 549

38. Where the debt was paid after an *alias pluries* writ issued, the defendant cannot object at the trial that the *latitat* was not returned; for at any rate if the *alias pluries* were the commencement of the action, it is only an irregularity, which, though a ground for application to the court to set aside the proceedings, yet having been once waived, cannot afterwards be objected to. Neither can it be objected at the trial that when the debt was paid the defendant had no notice of any action commenced or costs incurred. *Toms* v. *Powell.* 7 E. R. 536

39. Motions to put off trials must be made in bank when possible, and not at *nisi prius. Reg. Gen. Easter.* 49 *G.* 3 1 W. P. T. 505

40. Trials can not be put off by consent at *nisi prius. Reg. Gen. Mich.* 50 *G.* 3. 2 W. P. T. 221

41. Evidence given upon trial by the defendant of his having paid money into court under a rule does not entitle the plaintiff to a reply. *Reg. Gen. Hil.* 50 *G.* 3. 2 W. P. T. 267

XXV. *Summary Interference otherwise than for Irregularity; and Matters of general Practice.*

1. If by abuse of the process of one of the courts at *Westminster*, a sheriff's officer extort a promissory note from a suitor, and declare upon it in another of the courts of *Westminster*, the latter court cannot interfere summarily to punish the officer under 32 *G.* 2. *c.* 28. § 11. *Ex parte Evan Evans.* 2 B. & P. 88

2. If a party proceed by action and indictment for the same assault, the court (of C. P.) will not compel him to make his election. *Jones* v. *Clay.* 1 B. & P. 191

3. Nor will they stay proceedings in an action on the ground of a bill depending in Chancery for the same cause. *Murphy* v. *Cadell.* 2 B. & P. 137

4. If an action on the case for an injury to a house for which the plaintiff has delivered a bill of 1*l.* 10*s.* be commenced in the superior courts, proceedings therein may be stayed, the plaintiff's remedy being in the county courts. *Melton* v. *Garment.* 2 N. R. 84

5. If *A.* sue *C.*, the printer, and *B.* sue *D.* the proprietor of a newspaper for two libels, and respectively recover judgments; and then *A.* commence an action against *D.*, and *B.* against *C.* for the same libels, the court will not set aside the proceedings in the latter actions. *Martin* v. *Kennedy* and *Bunning* v. *Perry.* 2 B. & P. 69

6. After judgment on the defendant for a libel, the court refused to make an order on the prosecutor, to deposit the original libellous papers, with the officer of the court. *R.* v. *Cator* 2 E. R. 361

7. The court refused to proceed summarily against a steward, who was an attorney, to compel him to account before the master for receipts and payments in respect of a mortgaged estate and to pay the balance to his employer, and to deliver up, upon oath, all deeds, writings, &c. relative to the estate; this being the proper subject of a bill in equity, and not a case for a mandamus to compel a steward of a manor to deliver up court rolls, &c. in lieu of which this summary mode of proceeding has been adopted where the steward of the court is an attorney. *Cocks* v. *Harman* 6 E. R. 404

8. Where, pending a suit, a party obtains a judge's order for changing his attorney, it is unnecessary to file a new warrant. *Wood* v. *Plant*, q. t. &c. 1 W. P. T. 44

9. Under a judge's order to produce papers and give copies, it is sufficient to give extracts of those parts of letters which are relevant to the subject. *Clifford* v. *Taylor.* 1 W. P. T. 167

10. A plaintiff may, without consulting his attorney, compromise an action with the defendant, and take on himself the payment of the costs to the

attorney, if there be no fraudulent conspiracy to cheat the attorney of his costs.

Chapman & al. v. *Hasa*, 1 W. P. T. 341

11. If a plaintiff collude with a defendant's bail and his attorney to deprive the plaintiff's attorney of his costs, by settling a debt and accepting a part payment without the intervention of the plaintiff's attorney, the court of C. P. will not restrain the plaintiff's attorney from proceeding against the bail in order to recover such costs.

Swain v. *Senate.* 2 N. R. 99.

12. After writ of inquiry executed upon a judgment suffered by default, the plaintiff having recovered the amount of many items, some of which were due, but to others of which he would not be legally liable, the court set aside the inquisition, and granted a new writ of inquiry, to be tried before a judge of assize.

Day v. *Edwards.* 1 W. P. T. 491

13. If a plaintiff discontinue an action stayed in another court by a consolidation rule, and commence an action against the same defendant for the same cause in C. P. the court will stay proceedings until after the trial of the cause mentioned in the consolidation rule. *Parkin* v. *Scott.* 1 W. P. T. 565

14. An enlarged rule may be made absolute at any time on the last day to which it stands enlarged.

Shaw v. *Masters.* 2 W. P. T. 1-4

15. A summons for time to enter the issue when returnable is a stay of proceedings.

Anthill q. t. v. *Metcalfe.* 2 N. R. 169

16. Upon an application to the court by the demandant in a writ of right to be allowed to discontinue on account of the omission of one step in a descent, the court would not assist the demandant. *Maidment* v. *Jukes & al.* 2 N. R. 429

PREROGATIVE.

1. The power of the crown to pardon a forfeiture, and to grant restitution, can only be exercised where things remain in *statu quo*, but not so as to affect legal rights vested in third persons. *R.* v. *Amery.* 2 T. R. 569

2. A pardon, if pleaded, must be averred to be under the great seal; (except a statute pardon, or what amounts thereto.) *Bull* v. *Tilt.* 1 B. & P. 199

3. The king, by virtue of his prerogative, is exempted from the payment of taxes collected *personally* from the subject, and not mingled with the price of the commodity before it is known by whom it is to be made use of; therefore an express sent upon government service is not liable to pay the duty on post horses imposed by 25 *G.* 3 *c.* 51. § 4. *R.* v. *Cook.* 3 T. R. 519

4. If, after a grant of a next presentation to a living, the incumbent be made a bishop, by which the living becomes vacant, and the king is entitled to present, the grantee may present on the next vacancy occasioned by the death or resignation of the king's presentee. *Calland* (*or Cailland*) v. *Troward*, 2 H. B. 324; affirmed in K. B. 6 T. R. 439: and the judgments of both courts affirmed in *Dom. Proc.* 6 T. R. 778

5. Where the grant of *a rectory* by the crown contained an exception of all *churches* and *vicarages* thereto *belonging*, a *perpetual curacy belonging to the rectory* passed by the grant, not being included in the exception.

Arthington & al. v. *Chester Bp. & al.* 1 H. B. 418

6. Kensington Palace being kept in a constant state of preparation to receive the King, with his officers, servants, and guards residing and doing duty there at all times, and some of the royal family having apartments there, is privileged as a royal palace against the intrusion of the sheriff, for the purpose of executing process against the goods of one of the king's sons, having the use of certain apartments therein.

Winter v. *Miles.* 10 E. R. 578

PRESSING.

1. The Freemen and Livery of *London* are not exempted from being impressed for the sea-service, if in other respects fit subjects for that service.

R. v. *Young.* 9 E. R. 466

(And see IMPRESSING.)

PRISONER.

I. *Attorney, his Presence when requisite to a Prisoner.*

1. When a defendant in custody executes a warrant of attorney to confess a judgment, there must be an attorney present on his part; the presence of the plaintiff's attorney is insufficient, though the defendant consent to his acting as his attorney also.

Hutson v. *Hutson.* 7 T. R. 7

2. But when a defendant is *in execution* his attorney need not be present.
Birch v. *Sharland.* 1 T. R. 715
Crompton v. *Steward.* 7 T. R. 19

3. Or if he be in custody at the suit of a third person, and not of the plaintiff. *Smith* v. *Burlton.* 1 E. R. 241

4. Interlocutory judgment having been signed against a prisoner in custody of the marshal; the plaintiff's attorney took a *cognovit* from him for 200*l.*, with *a defeasance* on paying 49*l.* (the real debt) and the costs; but no attorney was present on the part of the defendant; though this case was not strictly within the rule of Court, (made 15 *Car.* 2.) which only mentions prisoners in the custody of the *sheriff's officers*, yet the Court interfered for the relief of a prisoner.
Parkinson v. *Caines.* 3 T. R. 616

5. But at the plaintiff's request they permitted him to alter his judgment to the real debt, on paying the costs. 3 T. R. 616

6. A warrant of attorney to confess judgment, executed by a prisoner in custody on criminal process, is good, though he have no attorney present.
Charlton v. *Fletcher.* 4 T. R. 433

7. If a defendant in custody, being about to execute a warrant of attorney to confess judgment, is informed that it must be done in the presence of an attorney on his part, and thereupon produces a person as such, in whose presence he executes the warrant of attorney; the Court will not set aside the proceedings thereon, because the person so produced by the defendant was not an attorney.
Jeyes one, &c. v. *Booth.* 1 B. & P. 97

8. If a prisoner on mesne process gives a warrant of attorney, the rule that his attorney must be present is not dispensed with, though two other sureties not in custody join in the warrant. *Valentine* v. *Gulland & al.* 2 W. P. T. 49

II. *Weekly Payments to.*

1. The Court of K. B. on a first application gave an opinion that the notes for the weekly payments of 3*s.* 6*d.* under the Lords' act must be stamped.
Pitman v. *Haynes.* 7 T. R. 530

2. But afterwards, on mature deliberation, they held that such a note need not be stamped.
Tekell v. *Casey.* 7 T. R. 670
(And see *Bowring* v. *Edgar* in C. P. 1 B. & P. 270).

3. A note for groats must be signed by all the creditors in the suit; and a defendant was discharged, though he had received some payments under a note signed only by one of the parties.
R. v. *Wilkinson.* 7 T. R. 156

4. But where a debtor was in execution at the suit of several plaintiffs on a joint debt, and one of them gave a note for the weekly payments signed by him alone "for himself and partners;" this was held to be good.
Meux & al. v. *Humphrey.* 8 T. R. 25

5. When several executors are plaintiffs, the note must be signed by all of them.
Lepine & al. v. *Bayley.* 8 T. R. 325

6. If a note for payment of the allowance to a prisoner under the Lords' Act be dated on a *Sunday*, and delivered on a *Monday*, and contain a general promise to pay the allowance weekly, the prisoner is entitled to be discharged.
Constantine v. *Pugh.* 3 B. & P. 184

7. *Qu.* Whether such a note ought not to contain an express promise to pay the allowance on a *Monday*, although it be dated on that day of the week. *ib.*

8. If a note for the weekly allowance to a prisoner in execution at the suit of a corporation, be sealed with the corporation seal, it is a sufficient compliance with the words of the Lords' Act; which require it to be signed with the name or mark of the plaintiff.
Doe d. Cutler's Company v. *Hogg.* N. R. 306

9. The note cannot be signed by the creditor's attorney if the creditor be dead. 1 B. & P. 336

10. The Court of C. P. held, that they could not, under the words of 37 *G. 3. c.* 8. § 2., moderate the sum to be paid weekly to a prisoner on his being remanded, but that a note must be signed for the full sum directed by that act. *R.* v. *Davis.* 1 B. & P. 336

11. An insolvent debtor has a right to his discharge if his groats be not paid before 10 o'clock at night of the day on which they are payable; and the right is not waived by the turnkey on the felon's side accepting them after that time. *Fisher* v. *Bull.* 5 T. R. 36

12. But if the turnkey accept a *French* half-crown of the creditor in payment of the groats, although the prisoner afterwards refuse it, that is a sufficient discharge as to the creditor.
5 T. R. 36, *n.*

13. Payment of the weekly allowance to a prisoner under the Lords' Act, to the person who opens the door of the prison, is a sufficient payment to the prisoner within the meaning of the act.
Parsons v. *Salomon.* N. R. 111

III. *Supersedeas, and Day-Rule.*

1. The Court of K. B. held that the rule that a prisoner who is once supersedeable always continues so, only holds so long as he remains *in the same custody and under the same process.*
Rose v. *Christfield.* 1 T. R. 591
2. A defendant superseded for want of being *charged in execution* in due time after judgment, cannot be again taken in execution upon the same judgment.
Line v. *Lowe.* 7 E. R. 330
But it seems otherwise if the defendant be superseded for want of proceedings before judgment. 7 E. R. 330
3. So that if a prisoner on mesne process were supersedeable for any irregularity, he cannot take advantage of that after he is charged in execution, if he had an opportunity of applying on that ground before he was charged in execution. 1 T. R. 591
4. The Court of C. P. (*Heath* v. *Rook.* J. J. abs. *Buller* J.) held, that if a defendant be supersedeable for want of judgment being entered up in time, but not actually discharged, he cannot be detained in an action on the judgment. *Pierson* v. *Goodwin.* 1 B. & P. 361
5. Defendant discharged out of the custody of the marshal, because there was no acknowledgment by him of the defendant's being in custody in the term in which he was charged in execution. *Fisher* v. *Stanhope.* 1 T. R. 464
6. A day-rule, when made, covers, by relation back, the liberation of a prisoner who had signed the petition, but had gone out of the prison before the sitting of the Court on the same day; though the marshal were sued for an escape. *Field* v. *Jones.* 9 E. R. 151
7. In the case of a defendant charged in execution, the committitur must be filed of the same term as the marshal's acknowledgment.
Cunningham v. *Cogan.* 10 E. R. 46
8. The Court will discharge a defendant out of custody in execution after the plaintiff's death if it appear that the next of kin do not intend to take out administration, on service of the rule *Nisi* on the next of kin.
Parkinson v. *Horlock.* 2 N. R. 240

PRIZE AND PRIZE-MONEY.

1. *Qu.* Whether an officer under arrest and suspension on board the fleet for an offence of which he is afterwards acquitted, is entitled to prize-money taken during such arrest and suspension? *Johnson* v. *Sutton (in error)* *Exch. Ch.* 1 T. R. 493
[This question came incidentally before the Court in an action by the officer suspended, against his superior officer for a malicious prosecution. See tit. Action ON THE CASE VI.]
2. In consequence of a trial, directed by the Court of Chancery, the Court of K. B. declared their positive opinion, that the captain of a ship, actually on board at the time of a capture, was entitled to prize-money, though under arrest at the time, and though another officer had been sent on board to command the ship.
Lumley v. *Sutton.* 8 T. R. 224
(And see ADMIRALTY I.)
3. A flag officer, who, after giving orders, to one of the ships under his command to sail on a cruise, received an appointment to another command, is not entitled to share in a prize taken (after his accepting the new appointment) by the ship so sent out by him to cruise, the ship not being actually under his command at the time of the capture.
Johnstone v. *Margetson.* 1 H. B. 261
4. Where a ship belonging to a squadron under the command of an admiral, sails by his orders on a cruise, but before any prize is taken he is superseded in his command by another admiral, and afterwards a prize is taken by the ship which so sailed; though it should be doubtful to which of the admirals the share of admiral would belong; clearly the captain of the ship taking the prize is not entitled to it. *Taylor* v. *Lord H. Pawlett, coram Lord Mansfield, nisi prius, A. D.* 1759.
1 H. B. 264, *n.*
5. But under such circumstances, the admiral who succeeds to the command, *i. e.* who is *actually in command at the time when the prize is taken*, is entitled.
Pigot v. *White, E.* 25 *G.* 3. *B. R.*
1 H. B. 265, *n.*
6. By the 4th article of the King's proclamation of 1797, respecting the distribution of prize, as to flag-officers, it is directed, that a chief flag-officer, *returning home* from a foreign station, shall have no share of the prizes taken by the ships *left behind to act under an-*

other command: this applies as well to *another command devolving* by seniority, as to another chief flag officer *appointed* by express commission to succeed the officer *returning home:* and such *returning home*, &c. means the commencement in fact of a commander-in-chief's departure from the local station of his command for the purpose of returning home, *leaving* his fleet *behind*, i. e. leaving it for all effective purposes under the control of another commander competent, under the terms of the proclamation, to command in his stead. Therefore where a flag-officer, commander in chief in the *Mediterranean*, returned to *England* by leave of the Admiralty for the recovery of his health, leaving the fleet under the command of the next flag officer in seniority, but having before his departure dispatched one of the fleet on a cruise, who made captures within the limits of the station, after the departure homewards of such commander in chief out of those limits, but before any new orders given by the next flag officer on whom the command of the station had devolved: held, that the right to the 1-8th, or commanding flag officer's share of prize, belonging to the *present acting* flag officer in command on the station, and not to the chief flag officer *returning home;* although the latter still retained the title, pay, and table money of commander in chief after his return home, and did not resign his commission as such till after the prize taken, and had official correspondence with the Admiralty in that character till his resignation, and made appointments in the fleet as such: the governing principle of His Majesty's proclamation being, that the reward of prize should be to the present effective commander on the station, and not to the nominal one who returns home, leaving ships behind to act under another command. *Nelson (Ld.)* v. *Tucker (in error)*. 4 E. R. 238

Note. The action was brought in C. P., and after two arguments upon a special verdict found, the Court was equally divided, but judgment was given *pro formâ* for the defendant. 3 B. & P. 257

7. And the doctrine in the preceding case will hold, though the superior officer, before his departure, directed the inferior to take under his command those ships only *by name*, which continued with him at the principal station, and the detached squadron *when they returned to the same place* after the particular service performed, for the performance of which he had before limited a time; and though such superior officer's commission was to command in chief a squadron upon a *particular service*, and not merely upon a particular station. At least the superior is not entitled to recover such share of prize from the inferior who had received it.

Lord Keith v. *Pringle*. 4 E. R. 262

8. One of the ships of a squadron is detached by the commanding flag officer to lie off a certain place within the limits of the station, from whence the captain, *without any further orders* for that purpose, though he had written for such to his superior officer and waited for them some time, takes upon him *on his own responsibility* (though from laudable motives which were afterwards approved of by the Admiralty) to depart and to proceed as convoy with the homeward-bound trade, and in the course of the voyage home, out of the limits of his station, (but nothing turned on the question of limits) he takes a prize: held, that the superior flag officer who had before the capture succeeded the one by whom the order for being detached had been originally issued, (admitting him to stand in the same situation in point of right) was not entitled to share the flag officer's share of 1-8th given by the King's proclamation to a flag officer *directing or assisting* in a capture by a ship under his command.

Harvey, Knt. v. *Cooke*. 6 E. R. 220

9. A flag officer at the *Cape of Good Hope* sends a ship of his squadron within the limits of another flag officer's command in the *Asiatic* seas, for the special purpose of getting her repaired: and after the ship's going there and completing her repairs in the manner directed by the latter officer, and receiving an order from him to convoy certain ships on her return to her former station, while executing such order, being accidentally separated from her convoy, took a prize within the limits of the flag officer's command in the *Asiatic* seas, but in the course of rejoining her original flag officer at the *Cape:* the Court of K. B. held that the latter was not entitled to the flag officer's

1-8th share of the prize; his command over the ship being suspended while she was out of the limits of his own, and within the limits of another command. *Holmes* v. *Rainier*. 8 T. R. 502

10. One who at the time of a prize taken by a custom-house cutter bore the commission of mate, but was *acting commander* on board, under an order from the commissioners, communicated by letter to the collector of the port to which the cutter belonged, and by him communicated by letter to such mate, is entitled to *the commander's* share of the prize under the King's warrant of the 26th of *November*, 1803, referring to his former warrant of the 4th of *July*, 1803; which speaks generally of the share to be given to the *commander*, officers, and crew, *as a reward for their service:* and this, though the former commander, *whose commission, as such*, had before been withdrawn and cancelled by order of the commissioners, on some supposed misconduct, was afterwards restored, and a new commission granted to him bearing the same date as his former commission, which was before the prize taken. And such acting commander was held to be entitled to the full share of commander, without deducting a share of a *deputed mariner*, who at the time of such capture made was on board *acting as mate* by like authority.

Pill v. *Taylor*. 11 E. R. 414

11. If the fleet of an ally and a *British* fleet serve together under a *British* commander in chief who detaches the squadron of the ally, the admiral of the auxiliary power is not entitled as a flag officer to share prizes made by *British* ships detached in another direction to which he lent no actual co-operation in effecting the capture.

Duckworth (*Bt.*) v. *Tucker*. 2 W. P. T. 7

12. If an ally actually co-operates in effecting a capture, he cannot recover any proportion of the prizes in the common law courts of this country, but must sue in the prize courts.

2 W. P. T. 7

13. Every instrument by which a seaman or marine conveys his prize-money or wages in the hands of the public officers, must be in the form prescribed by the stat. 26 *G.* 3. *c.* 63., and the other statutes to which it refers.

Turtle v. *Heartwell*. 6 T. R. 426

14. If the prize-court condemns captured vessels prize to His Majesty, the sentence while unappealed from is conclusive on the common law courts and on all the world, that no ally or other person is entitled to a share in it.

2 W. P. T. 7.

15. Common law courts cannot entertain jurisdiction of the question whether prize, or no prize, or by whom taken. *ib.*

16. If it can be discerned on the face of the sentence of a foreign court, of prize that the court condemned, on the ground that the property belonged to enemies, the sentence is conclusive evidence in the courts here that the property was not neutral.

Bolton v. *Gladstone*. 2 W. P. T. 85

PROCEDENDO.

1. If an indictment for felony has been removed here from an inferior court, in order to issue process of outlawry upon it, and the party accused come in, this court will award a *procedenda* to carry the record back.

R. v. *Perry*. 5 T. R. 478

2. If, after a *procedendo* to carry back a cause to an inferior court, the plaintiff recover, and then sue out a *scire facias* against the bail below, and they remove the proceedings against them into this court by *habeas corpus*, this court will award a *procedendo* in the suit against the bail.

Dixon v. *Heslop*. 6 T. R. 365

3. A couse was removed from an inferior court by an *habeas corpus cum causa*, to which a return was made, stating a custom under which the defendant was sued and arrested: the defendant who removed the cause not having proceeded in it here, the Court awarded a *procedendo*, though error was suggested on the face of the proceedings below; this Court saying they would leave the defendant to his writ of error.

Horton v. *Bechman*. 6 T. R. 760

PROHIBITION.

1. A prohibition will be granted to a court of appeal, where it appears that they have no jurisdiction over the subject-matter, even after they have remitted the suit to the court below, and awarded costs against the appellant, and though the party applying for a prohibition appealed to that court.

1 T. R. 555

2. Where a *modus* is pleaded in an ecclesiastical court, a prohibition may be granted any time *before final sentence.*
Darby v. *Cozens.* 1 T. R. 552
(And *Notley and Cozens*, S. P.)

3. Prohibition to a spiritual court will be granted after sentence, if it appear on their proceedings that they have exceeded their jurisdiction.
Leman v. *Goulty.* 3 T. R. 3

4. Therefore, though they may compel churchwardens to *deliver in* their accounts, yet as they cannot *decide on* the propriety of the charges, a prohibition will be granted if they do.
3 T. R. 3

5. Prohibition was granted to stay a suit in the spiritual court for breaking open a chest in the church, and taking away the title deeds to the advowson.
Gardner v. *Parker.* 4 T. R. 351

6. Calling a person *whore* is libellous in the spiritual court. 2 T. R. 473

7. If the spiritual court hath cognizance of part of the charge only, and not the rest, the court, after sentence below, would not grant a prohibition.
2 T. R. 473

8. So where the subject of a suit in an inferior court is within the jurisdiction of that court; though in the proceedings a matter be stated which is out of its jurisdiction, yet unless it is going on *to try* such matter, a *prohibition will not lie.*
Dutens(Clk.) v. *Robson.* 1 H. B. 100

9. A prohibition issued to the Bishop of *Chichester*, who claimed a right to present by lapse, under pretence of his visitatorial authority, to the office of a canon residentiary of his church: it being a freehold office, and the right of election thereto in the dean and chapter. *The Bishop of Chichester* v. *Harward & al.* 1 T. R. 650

10. If a *modus* be not proved as laid by the plaintiff in a suit in prohibition, there must be a verdict for the defendant, who is intitled to costs: but if any *modus* be found, though different from that laid, that is a ground for the court to refuse a consultation.
Brock v. *Richardson.* 1 T. R. 427

11. *Quære.*—Whether the misinterpretation of a statute by an inferior court, the consideration of which arises incidentally in the course of a proceeding which is confessed to be within its jurisdiction, be a ground for a *prohibition?* Whether it be not rather a matter of appeal? But clearly in such a case a prohibition will not lie, unless it be made appear to the superior Court, that the party applying for the prohibition, has, in the course of the proceedings in the inferior court, alleged a ground for a contrary interpretation of the statute, on which he applies for the prohibition, and that the inferior court has proceeded notwithstanding such allegation.
2 H. B. 533

12. Where a Spiritual Court incidentally determines any matter of common law cognizance, such as the construction of an act of parliament, otherwise than as the common law requires, prohibition lies after sentence; although the objection do not appear upon the face of the libel, but is collected from the whole of the proceedings below.
Gould v. *Gapper, Clerk.* 5 E. R. 345

13. Courts-Martial, Courts of Admiralty, and Courts of Prize, are all liable to the controuling authority of the Courts at *Westminster;* the general ground of prohibition being an excess of jurisdiction, when they assume a power in matters not within their cognizance, or act contrary to the rules of an act of parliament made to limit their authority. That they have decided wrong, or that there is error in the proceedings, may be a ground of appeal on review, *but not of prohibition,* there being no ground for the interference of the courts at *Westminster* where the matter is clearly within the jurisdiction of such inferior courts.
2 H. B. 100. 101. 107

14. The Prize Court of Appeals has jurisdiction to decree that one who was co-agent of the captors, in whose hands the proceeds of the prize after condemnation and sale were placed, should after a decree of restitution with interest pronounced against the captors, pay *interest* on such proceeds while in his hands to the claimant. And *B. R.* will not grant a prohibition to the Prize Court to restrain it from executing such decree, either on the ground that it did not appear on the proceeding below that the agent was a *registered* agent under the statute 33 *G. 3. c. 66.*; because that court has original jurisdiction *in rem* and its incidents independent of the statute; nor on the ground that the court below were restrained by the 32d clause of the act from decreeing restitution of more than the *net proceeds* of the sale, awarded

upon condemnation; because *interest* made of such *net proceeds* in the hands of the holder are to be deemed part of the proceeds; nor on the ground that it was not alleged that *interest* had *in fact* been made by such agent; because that was a fact for the court below to decide upon, and they must be presumed to have decided on satisfactory evidence. *Willis* v. *The Commissioners of Appeals in Prize Causes.* 5 E. R. 22

15. The Court of C. P. refused to grant a prohibition to prevent the execution of the sentence of a court-martial, passed against *A.*, who had *received pay as a soldier* (but assumed the military character merely for the purpose of recruiting in the usual course of that service), though the proceedings of the court martial appeared to be in some instances irregular.
Grant v. *Gould* (*Sir C.*) 2 H. B. 69

16. The Court of C. P. has no power to issue an original writ of *prohibition* to restrain a bishop from committing waste in the possessions of his see; at least at the suit of an uninterested person. *Semb.* That no court of common law has that power. *Qu.* If the Court of Chancery has not.
Jefferson v. *Durham (Bishop of) & al.* 1 B. & P. 105

17. Where a rector was cited in the episcopal consistorial court to shew cause why the ordinary should not grant to a parishioner a faculty for stopping up a window in a church against which it was proposed to erect a monument, to the granting of which the rector dissented; notwithstanding which the court below were proceeding to grant the faculty with the consent of the ordinary; held to be no ground for a prohibition, but mere matter of appeal, if the rectors reasons for dissenting were improderly overruled. *Bulwer, Clerk* v. *Hase.* 3 E. R. 217

18. After sentence in the ecclesiastical court in a matter of tithe, where the question turned upon the construction of an act of parliament, upon a doubt raised whether that court had not misconstrued the act, this court directed the plaintiff to declare in prohibition, for the more solemn adjudication of the question, whether supposing the court below to have misconstrued the act, a prohibition should go after sentence in a matter in which the court below had original jurisdiction, or whether it was only a ground of appeal?
Gare v. *Gapper* (*Clerk*), *and Gould* v. *Gapper* (*Clerk*). 3 E. R. 472

19. Prohibition granted on affidavit that the defendant (to a libel for tithes in kind in the spiritual court) *answered on oath*, or *pleaded* a modus; without its appearing that the modus was regularly pleaded below, so as to be put in issue there.
French (Clk.) v. *Trask.* 10 E. R. 348

20. Prohibition denied to the spiritual court upon its rejection of a modus set up there of 1*d.* for every turkey laying eggs, or of every tenth egg, &c. in lieu of tithe of turkies, at the option of the vicar; such modus not ascertaining any certain time when the money payment in lieu of the eggs was to be made, in case the option was made to take it in money.
Roberts v. *Williams (Clk) & al.* 12 E. R. 33

PURCHASER.

1. A Purchaser is not compelable to accept a title to premises, formerly subject to an incumbrance, the discharge of which is shewn only by presumption. A leasehold was sold, subject to a ground-rent, which was said to be apportioned out of a larger rent, but the apportionment was not evidenced by an existing deed, but only by the acceptance of a mesne landlord, and presumption: held that the purchaser was not bound to accept the title.
Barnwell v. *Harris.* 1 W. P. T. 430

2. A voluntary settlement of lands, made *in consideration of natural love and affection*, is void against a subsequent purchaser for a *valuable consideration*; though with notice of the prior settlement before all the purchase money was paid, or the deed executed; and though the settler had other property at the time of such prior settlement, and did not appear to be then indebted, and there was no fraud in fact in the transaction: for the law, which is in all cases the judge of fraud and covin arising out of facts and intents, infers fraud in this case, upon the construction of the statute 27 *Eliz. c.* 4. *Doe d. Otley* v. *Manning.* 9 E. R. 59

Q.

QUARE IMPEDIT.

1. If the right of nomination be in one, and of presentation in another, and either impede the other in his right, a *quare impedit* lies. 3 T. R. 640
2. Where the right of nominating is in *A.* and of presenting in *B.*, *B.* is to judge of the qualification of the person nominated, in the same manner as a bishop does; but if the person presenting object to the nomine on the ground of immorality, that must be tried by a jury. 3 T. R. 646
3. In pleading a right in coparceners to present an advowson by turns, it is good to state that the right arose because they *did* not agree to present, which is synonimous to saying they *could* not agree. 1 H. B. 376
4. If three coparceners of an advowson do not agree to present on a vacancy, the eldest (or her assigns) may present to the first turn; and the second and third (or their assigns) to the next turns, according to the order of the birth of the coparceners. 1 H. B. 412
5. *A.*, *B.*, and *C.*, three sisters, are coparceners of an advowson. *A.* marries *D.*, on whom *A.*'s third is settled; *B.* marries *E.*; and *C.* dies, having devised her third to *F.*, the son of *B.* and *E.*—*D.*, *E.*, and *F.* being thus entitled, under or in right of the several original coparceners, a *quare impedit* is brought by *G.*, a stranger, against *D.* and *E.*—*E.* dies pending the writ, and the share of *B.* (previously deceased) thereupon descends to *F.*, in addition to the share devised to him by *C.*—*D.* suffers judgment by default.—This judgment against *D.* is a bar to a *quare impedit* brought by *D.* and *F.* (in which *D.* is summoned and severed) to recover *the same presentation;* but is not a bar to *F.*'s right to recover on the next avoidance in his turn. *Barker & al.* v. *London (Bishop), & al.* 1 H. B. 412; (and *Willes's Rep.* 659).
6. In *quare impedit* the defendant pleaded that one *M. O.* under whom he claimed being seised in fee of one moiety of the advowson to present to one turn in every two turns, presented one *J. O.* in her proper turn; that the church being afterwards vacant, one *J. W.*, under whom the plaintiff claimed, presented in his proper turn; that the church being again vacant, the plaintiff presented; and that the church being a fourth time vacant, it belonged to the defendant to present. On demurrer to this plea, the court held that the defendant had not shewn a title to present, since he had not shewn whether the third presentation was by usurpation or by agreement, and that it could not be presumed that the defendant was entitled to present in the first and fourth turn, and the plaintiff in the second and third, since the plea averred that *M. O.* had presented to the first turn in her proper turn, and *J. W.* in his proper turn. *Birch* v. *Lichfield and Coventry (Bishop).* 3 B. & P. 444
7. *Semb.* that if it had appeared by the plea that the plaintiff had presented to the third turn by usurpation, he would still have been entitled to the fourth turn by right. *ib.*

QUO WARRANTO INFORMATIONS.

I. *Limitation of Time for applying for.*

[See statute 32 *G.* 3. *c.* 58. "for the amendment of the law in the proceedings upon information in nature of *quo warranto;*" under § 1. of which a defendant may plead that he has held or executed his office for six years or more; and on a verdict on such issue should be entitled to judgment in his favour with costs; and this extends to informations by the attorney-general; by § 2. derivative titles are also protected. Under that act, a defendant may plead several pleas even though he do not plead (in one of them) the limitation imposed by the statute.

R. v. *Autridge.* 8 T. R. 467

The following cases were determined previous to that act.]

1. The court will consider all the circumstances of the case before they disturb the peace of corporations.

R. v. *Stacey.* 1 T. R. 3

2. The court determined that they would not grant an information in the nature of a *quo warranto* after twenty years' quiet possession. 1 T. R. 1

3. And it was held that length of time, though less than twenty years, might induce the court to refuse such an information under certain circumstances. 1 T. R. 3

4. Fourteen years quiet possession held a sufficient length of time for refusing an information. *R.* v. *Pike Braddock, T.* 20 *G.* 2. 1 T. R. 3, *n.*

5. And in the principal case, a *quo warranto* information against a freeman of the borough of *Winchelsea* was refused after sixteen years' acquiescence under the election of a mayor (under which the defendant claimed), where a mere blunder was committed, as to the person who ought to have presided thereat in the absence of the old mayor, whose duty it was. The corporation consisted of a mayor, jurats, and freemen; and the election of mayor was made annually by the body of freemen out of the jurats, which latter have no right to vote; and on that occasion the election appeared to have been held before the new mayor himself, instead of the oldest freeman: but all parties had concurred at the time.
R. v. *Stacey.* 1 T. R. 1

6. The court said they would in no case grant a *quo warranto* information after twenty years quiet possession.
R. v. *J. Newling.* 3 T. R. 310

7. And that applications made within that time might be refused on particular circumstances. 3 T. R. 310

8. Such an application refused after fourteen years' quiet possession.
R. v. *Pike* and *Prideaux.* 3 T. R. 311

9. At length the court resolved to limit their own discretion, and that they would not, under any circumstances, grant an information in nature of *quo warranto* against a person who has been in the peaceable possession of his franchise six years.
R. v. *Dickin.* 4 T. R. 282

10. And soon afterwards the court determined that they would not grant a *quo warranto* information to impeach a derivative title, if the person claiming the original title has been in the undisturbed possession of his office six years. *R.* v. *G. Peacock.* 4 T. R. 684

II. *Other Causes for refusing.*

1. Whether the court will grant an information to impeach a derivative title, where the person from whom it was derived died in the undisturbed possession of it? *Qu.* *R.* v. *Stacey.* 1 T. R. 4

2. Such title shall not be impeached by those who have acquiesced and acted under it. 1 T. R. 4

3. After the death of a mayor, *Blackstone* J. would not suffer his eligibility to be disputed, but merely the fact whether he was mayor or not, which the corporation books shewed; and if he was in fact mayor, it was to be taken that he had been regularly so.
R. v. *Spearing, Spring Ass. at Winchester* 1771, (cited in *R.* v. *Stacey*). 1 T. R. 4, *n.*

4. It was held that possession of a corporate franchise for less than twenty years, was not of itself a sufficient objection to an information in nature of a *quo warranto* to try the validity of the title to such franchise.
R. v. *Bond.* 2 T. R. 767

5. But that the circumstance of the relator's standing in the same situation with the defendant, or its appearing that the corporation must necessarily be dissolved by impeaching the defendant's title, and the title of those who claim under him, would govern the discretion of the court in refusing such an application. 2 T. R. 767

6. The fact of the defendant's title having been before attacked by a similar information, which was afterwards abandoned, was not allowed to have any weight. 2 T. R. 767

7. The court refused to grant a *quo warranto* information, because the party applying for it had agreed not to enforce a bye-law upon which he now grounded his attempt to impeach the defendant's title.
R. v. *Mortlock.* 3 T. R. 300

8. The court refused to grant an information against one who had served the office of mayor twelve years before, when the rule to shew cause was obtained upon an affidavit that the relator did not *believe* he had been duly sworn in, and the rule was opposed by an affidavit, which did not expressly allege that he had been duly sworn, but stated that he *appeared by the corporation-books to have been sworn in.* 2 T. R. 310

9. Refused after eight years, though applied for on affidavit of the town-clerk that defendant had not taken the oaths of allegiance, *&c.*; it appearing by the corporation-books that he had, and it not being a *recent* complaint.
R. v. *Helleston (Mayor).* 3 T. R. 311

10. In general the title of the electors is not to be brought in question by attacking the title of the person elected by them: but this rule does not apply where there is no method of prosecution by which the title of the electors may be questioned in the first instance. 3 T. R. 596

11. There must be an *user* as well as a *claim* of a franchise in order to found an application for an information in nature of a *quo warranto;* stating that the defendant, who was elected to an office, had tendered himself to be sworn in, is not sufficient.
R. v. *Whitwell.* 5 T. R. 85

12. But a swearing in, though defective in law, yet being such whereby the party claimed at the time to be a free burgess of a corporation: held a sufficient user of the office to warrant an information in nature of a *quo warranto* against him, and not like a mere claim of the office.
R. v. *Tate.* 4 E. R. 357

13. Upon a question concerning the validity of an election to a vacant fellowship made by the fellows of *Trinity-Hall, Cambridge,* which was disputed by the master, the court held that an information in nature of *quo warranto* would not lie; but thought the proper remedy in such case was by *mandamus,* or by an action brought by the fellow appointed by the master, to try his right. *R.* v. *Gregory, E.* 12 *G.* 3. 4 T. R. 240, *n.*

14. The court will not grant a *quo warranto* information to try the validity of an election to the office of churchwarden, because it is no usurpation on the crown.
R. v. *Shepherd.* 4 T. R. 381

15. Where an information in nature of *quo warranto* was moved for on the ground of a disputed mode of election, which alone was in controversy at the time of the defendant's election, and which ground was afterwards answered on shewing cause, the court would not, in their discretion, make the rule absolute to try another incidental and secondary question, as to whether there were a sufficient interval of time allowed between the nomination and election of the defendant; no person's right having been set aside by means of such acceleration of the election, if it were accelerated.
R. v. *Osbourne.* 4 E. R. 327

16. Where a corporation was dissolved, and no corporate body existed in fact at the time, the court refused to grant an information in nature of *quo warranto* against an individual for an impertinent claim to be returning officer at an election of members to serve in parliament, by virtue of his having been elected an alderman while the corporation existed in fact; there being no *civil* right in controversy, but it being rather the ground of a proceeding in *poenam* by the Attorney-General. *R.* v. *Saunders.* 3 E. R. 119

III. *For what Offices or Purposes grantable; and on whose Application.*

1. Informations in nature of a *quo warranto* have been considered of late years merely as civil proceedings. 2 T. R. 484

2. An information in nature of a *quo warranto* granted against a port-reeve of a borough and manor, who as such was the *returning* officer of the borough. *R.* v. *Mein.* 3 T. R. 596

3. Information in nature of a *quo warranto* lies against a person claiming to have a right of voting by virtue of a burgage tenement. *Horsham* case, *H.* 30 *G.* 3. 3 T. R. 599, *n.*

4. Information in nature of *quo warranto* lies for the office of bailiff of a court leet, being a prescriptive officer, having a power to summon, and select the jury. *R.* v. *Bingham* (*Clerk*). 2 E. R. 308

5. In considering whether they should give leave to file a *quo warranto* information, the court will judge from all the circumstances who are the real prosecutor. 6 T. R. 503

6. It is no objection to an application for an information in nature of a *quo warranto* against a mayor for not having taken the sacrament within the proper time before his election, according to stat. 13 *Car.* 2. st. 2. *c.* 1; that the relators concurred in his election; because that defect is a latent one, arising from the omission of an act positively required by the legislature.
R. v. *Smith.* 3 T. R. 573

7. And the court for such an omission will grant an information at the prayer of a mere stranger to the corporation, because it concerns the interest of the whole kingdom. *R.* v. *Brown,* *E.* 29 *G* 3. 3 T. R. 574, *n.*

8. It is no objection to relators applying for a *quo warranto* information against

the defendant for exercising the office of an alderman (his election to which they had opposed), that they afterwards made no opposition to his election to the principal office of magistracy (to which the other was a necessary qualification); or that they afterwards attended at and concurred in corporate meetings whereat he presided or whereat he attended in his official character: such application being made within the time limited by law, viz. in four years after the defendant's election as an alderman.

R. v. *Clarke.* 1 E.R. 36

9. It seems that though such an information may be granted on the relation of a stranger to the corporation; yet he ought to make out a very strong case for the interference of the court. *R.* v. *Kemp, Hil.* 29 *G.* 3. *ib.* 46, *n.*

10. Where sufficient appears by the affidavits to draw the merits of an election to a corporate office into question, the court will not grant an information in nature of a *quo warranto;* though the fact of the defendant's usurpation no otherwise appeared than by the deponent's swearing to their information and belief, that the defendant was admitted a freeman, and sworn and enrolled accordingly, the defendant not denying the fact when called upon by a rule to shew cause.

R. v. *Harwood.* 2 E. R. 177

11. It is no objection to the person applying for an information in nature of a *quo warranto*, which would operate in its effect to dissolve the corporation, that they attended the meeting at which the mayor was elected, whose election they impeached on the ground that the corporation was then dissolved by the loss of an integral part, and that they voted for another candidate, and afterwards attended other corporate meetings at which such mayor presided.

R. v. *Morris and Stewart.* 3 E. R. 213

12. An application for a *quo warranto* information made on the affidavits of several persons, of whom all but one have consented to the election proposed to be impeached, may be granted on the affidavit of that one, if he avow himself to be the relator.

R. v. *Symmons.* 4 T. R. 223

13. The court will not permit one corporator to file an information in nature of a *quo warranto* against another for a defect of title which equally applies to his own, or to the title of those under whom he claims.

R. v. *Cudlipp.* 6 T. R. 503

14. The stat. 15 *Car.* 2. *c.* 17. creating the corporation of the *Bedford Level* directs that they shall appoint a *registrar*, &c. and other offices at their pleasure; the duty of which registrar is to register titles to land within the level; and he takes an oath of office; held, that an information in nature of *quo warranto* does not lie against such an officer; he being a *mere servant* of the corporation, and his office not affecting any franchise, or other authority holden under the crown. *R.* v. *Bedford Level Corporation.* 6 E.R. 356

15. But an information in nature of *quo warranto* was granted against several for exercising the office of commissioners for paving the town of *Taunton*, under an act of the 9 *G.* 3., to whom a power was given to impose rates and taxes on the inhabitants.

R. v. *Badcock & al.* 6 E. R. 359

16. an information in nature of a *quo warranto* granted in order to try whether a residence in a borough, previous to an election, one of the qualifications for which was residence, were *bona fide* or not. *R.* v. *Richmond* (*D.*) 6 T. R. 560

IV. *Proceedings and Pleadings on.*

1. When a proper case has been laid before the court to induce them to grant an information, they have never exercised any controul over it afterwards, as to the manner in which it is to be conducted. 4 T. R. 276

2. If the affidavit in support of the rule for such an information omit a material fact, which is stated in the affidavit filed on the other side, the latter affidavit may be read by the prosecutor in support of his rule. 3 T. R. 596

3. Where leave had been granted by the court to file an information in nature of a *quo warranto* against a party for claiming to be common council-man of *York*, and the relator by his replication attacked also the defendant's title as freeman, which had been stated in the introductory part of his plea, the court refused to strike it out, or direct their officer to enter a *noli prosequi*.

R. v. *Brown.* 4 T. R. 276

4. The defendant in a *quo warranto* information derived title under a custom for "*the mayor and burgesses of* N. *in common council assembled, under their*

various names of incorporation, from time immemorial till the granting of letters patent by Q. *Elizabeth*, and for *the mayor, bailiffs, and capital burgesses, in common council assembled* since that time," to admit every person of the age of twenty-one whom they chose; after verdict for the defendant establishing this custom, the court held it well pleaded; it appearing to them to have been always exercised by the same body, *ss.* the *common council*, though constituted of different persons at different times. 4 T. R. 425

5. After a defendant in *quo warranto* information has appeared, the prosecutor must give two four days rules to plead, and after the expiration of the last must also move in term-time for a peremptory rule to plead, otherwise the defendant has until the next term to plead. *R.* v. *Ginever.* 6 T. R. 594

6. Whether a prosecutor of an information in a nature of a *quo waranto* can demur to part of the defendant's plea, and reply to the rest?
Quare R. v. *Ginever.* 6 T. R. 733

7. Upon an information in nature of *quo warranto* against one for claiming the office of alderman, if he disclaim, and judgment of ouster be given against him, he is concluded from shewing to a second information, for exercising the same office, that he was duly elected before such first information and judgment of ouster, and that he was afterwards sworn in by virtue of a peremptory mandamus from this court. But, *semble*, if the election to the office were good, and only the first swearing in irregular, the first judgment should not have been an absolute judgment of ouster; but either a judgment of *capiatur pro fine* only, for the temporary usurpation, or a judgment of ouster *quousque*, &c.
R. v. *Clarke.* 2 E. R. 75

8. A mandamus to swear one into an office, confers no title in itself to such office. *Per Lawrence, J. ib.* 85. And *R.* v. *The Burgesses of Truro. B. R.* 35 *G.* 3. cited. *ib.*

R.

RANSOM.

1. In the case of a ransom bill, the owners are not liable beyond the value of the ship and cargo. *Helly* v. *Grant, T.* 23 *G.* 3. *cited in Yates* v. *Hall.* 1 T. R. 76

2. But a promise by a captain of a ship, on behalf of his owners when the ship was taken, to pay monthly wages to one of the sailors, in order to induce him to become a hostage, is binding on the owners, although they abandon the ship and cargo.
Yates v. *Hall.* 1 T. R. 73

3. *Qu.*—Whether, after a capture and ransom, the owner is liable to pay wages for the time which elapsed previous to the capture? 1 T. R. 79 (See stat. 22 *G.* 3. *c.* 25.)

4. A sentence of condemnation of a *British* ship (which had been captured by a *French* privateer and carried into *Bergen* in *Norway*) by the *French* consul at *Bergen*, is an illegal sentence. —If after such a sentence the owner repurchase his ship at a public auction at *Bergen*, he cannot recover the money so paid from the underwriter.—Such a contract is a ransom and illegal under the acts 22 *G.* 3. *c.* 25., 35 *G.* 3. *c.* 66. § 37, 8, 9.
Harelock v. *Rockwood.* 8 T. R. 268

5. The statute, prohibiting ransoms, being remedial acts are to be construed liberally. 8 T. R. 277

6. A ransom may take place on shore in a neutral country as well as on the high sea. 8 T. R. 277

7. It is not necessary that an hostage should be given to constitute a ransom. 8 T. R. 277

RECOVERY.

1. The nature and operation of common recoveries stated and explained at large. *Martin d. Tregonwell v. Strachan, H.* 16 *G.* 2. 5 T. R. 107, *n.*

2. The tenant to the *præcipe* must have a freehold in possession, otherwise a recovery suffered by him is invalid.
Roe d. Hale v. *Wegg.* 6 T. R. 708

3. Though the deeds to make a tenant to the *præcipe* be not executed till after the execution of the writ of *seisin*, still the recovery will be good by stat. 14 *G.* 2. *c.* 20., if the deeds be executed in the term in which the recovery is suffered. *Goodright d. Burton* v. *Rigby*, 2 H. B. 46; affirmed in K. B. 5 T. R. 177

4. *A.*, tenant for years remainder to *B.* for life, remainder to the first and other sons of *B.* in tail, remainder to *B.* in tail; *A.* and *B.* join in a lease and release to make a tenant to the *præcipe*, and suffer a recovery; the estate-tail limited to the sons of *B.* is not divested by the recovery, nor is there any forfeiture of the respective estates of *A.* and *B.* *Smith d. Richards* v. *Clifford.* 1 T. R. 738

5. By such recovery *B.* only barred his remainder in tail, subsequent to the remainder in tail to his first and other sons. 1 T. R. 738

6. If a tenant in tail *by purchase* under a settlement, made by his ancestor *ex parte materna*, suffer a recovery, and declares the uses to himself in fee, he takes the fee as a purchaser descendible to his paternal heirs. *Roe d. Crow* v. *Baldwere.* 5 T. R. 104

7. If tenant in tail by descent from the maternal ancestor suffer a recovery, and declare the uses to himself in fee, the estate will descend to the heirs *ex parte materna*, whether it be copyhold or freehold. 5 T. R. 104

8. Under a devise of land to a trustee and his heirs, out of the rents and profits to pay an annuity to the testator's wife, and the overplus to his nephews; and after his wife's death, to the *use* of his nephews and the survivor for their lives; remainder to the *use* of the trustee to preserve contingent uses and estates, &c. during their lives; and after their deceases *in trust* for the heirs male of the body and bodies of the nephews; and in default of such issue, then to the *use* of another in fee: The court of K. B. held that the limitation *in trust* for the heirs male of the body and bodies of the nephews was executed by the statute, and therefore united with the prior *use* executed in them for life; and that a recovery suffered of the whole estate by the survivor of the nephews after the death of the other nephew without issue, and after the death of his own issue, bound the entail, and defeated the subsequent limitation in fee. *Doe d. Terry* v. *Collier.* 11 E. R. 377

9. Under a devise of a mansion and family estate to several succesively for life and in tail; with a proviso that whatsoever person should, by virtue of the will, became possessed of, or entitled to the estate, should, from the time he became so possessed, take upon himself the surname of *Thelwall, and make the mansion his usual and common place of abode and residence:* held that a tenant in tail in remainder succeeding to the possession, who had also become *heir at law* to the testator, since his death, not being found to have had notice of the will of her ancestor containing such condition, her title could not be impeached by the remainder-man over, who brought ejectment after her death against her husband, by whom she had issue which died before her: she having also in fact suffered a recovery about four months after she came of age, within which period it was contended that she ought to have complied with the condition of residence to enable her to make a good tenant to the *præcipe*. *Doe d. Kenrick, et al.* v. *Beauclerck.* 11 E. R. 657

10. It is no objection to the passing a common recovery, that the order of the names of the vouchees in the *præcipe* at bar and the dedimus varies, nor that the warrants of attorney of the several vouchees, are on separate pieces of parchment. *Lang & al.* v. *Woodhouse & al.* 1 B. & P. 31

11. If the different vouchees in a recovery execute, and acknowledge several warrants of attorney, though upon the same piece of parchment, the court will not suffer the recovery to pass. *Jennings* v. *Street.* 3 B. & P. 361

12. And if under a *dedimus potestatem* to take the acknowledgment of nine persons to a fine; the commissioners take the acknowledgment of six on one piece of parchment, and of three on another, the court will not allow the fine to pass. *Balch* v. *Phelps.* 3 B. & P. 366

13. If a recovery do not pass within the term in which the *dedimus* recites the writ of summons to be returnable, it will not suffice to indorse on the renewed *dedimus* a return purporting to be made by the commissioners who returned the former writ, without having their actual signature. *Bevir, Demandant; Robbins, Tenant; Beech, Vouchee.* 1 W. P. T. 418

14. In every common recovery where the vouchee shall personally appear, the writ of entry shall be sued out, and produced at the time of the recording of the vouchee's appearance at the foot of the *præcipe* in such recovery. *Reg Gen. C. P. T.* 30 *G.* 3.

1 H. B. 526, 7

15. In every common recovery wherein the tenants' or vouchees' warrants of attorney shall be taken under a *dedimus potestatem*, there shall be written on every copy of the *præcipe* and of such warrant of attorney (having the affidavit required by the rule of *H.* 14 *G.* 3. thereto annexed) the *allocatur* of the L. C. Justice, or some other Justice, in the same manner as on fines taken by *dedimus potestatem:* and the copy of the *præcipe* and warrants of attorney, with the *allocatur* thereon, shall be filed as directed by the said rule: and at the time of signing such *allocatur*, the writ of entry for such common recovery shall be produced before the judge signing such *allocatur*, who may mark such writ with his title, name, or initials; and such writ shall also be produced at the time of the arraignment of such recovery.
Reg. Gen. C. P. T. 30 *G.* 3. 1 H.B.527

16. No common recovery (or fine) shall pass unless the taking of the warrants of attornies be before one of the justices or barons at *Westminster* or a serjeant, without an affidavit being filed that the commissioners taking the same are either barristers of five years standing, or solicitors or attornies of some of the courts at *Westminster;* the judges of the court of session and exchequer or advocates and clerks to the signet, or five years standing in *Scotland.* *Reg. Gen. C. P. M.* 39 *G.* 3.
1 B. & P. 362

17. A recovery cannot be suffered of premises in one of two counties in the alternative. *Wainwright, Demandant; Seagrave, Tenant; Smith, Vouchee.*
1 W. P. T. 538

18. It is no objection to a recovery with double voucher that the tenant jointly vouches the tenant for life and remainder man in tail, who vouch over the common vouchee. *Doe d. Greasly* v. *Nelson & al.* 2 W. P. T. 59

19. In a recovery, if the acknowledgment of the vouchees is taken abroad, a notarial certificate, made to authenticate the affidavit of the commissioners, must distinctly state that the affidavit was sworn. *Laidlaw, Demandant; Cox, Tenant; Brown & al. Vouchees.*
2 W. P. T. 205

20. Recovery amended by transposing the names of the demandant and tenant. *Roberts, Demandant; Robinson, Tenant.* 2 W. P. T. 222

REPLEVIN.

1. Whether goods taken under a warrant of distress granted by commissioners of sewers may not be replevied while in the hands of the officer? *Qu.*
Pritchard v. *Stevens.* 6 T. R. 522

2. Whether they may not be replevied by the sheriff or his deputy? *Qu.*
6 T. R. 522

3. If they be actually replevied, and the proceedings in replevin be removed here, this court will not quash the proceedings on a summary application, but will leave it to the defendant in replevin to put his objection on the record. 6 T. R 522

4. If insufficient pledges *de retorno habendo* be taken by the officer of the court below in replevin, the remedy against him is by action, and this court (C. P.) will not order him to pay the costs recovered by the defendant in replevin.
Tesseyman v. *Gildart.* N. R. 292

5. The action on the case against the sheriff for taking insufficient pledges in replevin, ought to be brought by the person making cognizance, where there is no avowant on the record.
Paige v. *Eamer Knt. & al.* 1 B.&P. 378

6. In such an action the court of K. B. held that the plaintiff could not recover damages beyond the value of the distress taken, which was not equal to the rent in arrear.
Yeq v. *Lethbridge.* 4 T. R. 433

7. But in a similar action it was ruled by the court of C. P. on great consideration, that the plaintiff might recover damages to the extent of the injury which he had actually sustained, though they exceeded *double the value* of the things distrained.
Concanen v. *Lethbridge.* 2 H. B. 36

8. In a subsequent case however (*Eyre* C. J., *Buller* J., and *Rooke* J., having succeeded Lord *Loughborough* C. J., *Gould* J. and *Wilson* J. at the time of the former determination) the court of C. P. declared that the good sense and justice of the case was, that the sheriff should be liable no farther than the sureties would have been if he had done his duty under stat. 11 *G.* 2. *c* 19. *viz.* to the amount of *double the value* of the goods distrained.
Evans v. *Brander & al.* 2 H. B. 547

9. A defendant in replevin is entitled to an assignment of the replevin-bond, if the plaintiff in replevin do not appear in the county court and prosecute according to the condition.
Dias v. *Freeman*. 5 T. R. 195

10. And he may sue on the bond as assignee of the sheriff in the superior courts, though the replevin be not removed out of the county court.
5 T. R. 195

11. The two sureties in a replevin bond are together liable only to the amount of the penalty in the bond, and the costs of the suit on the bond.
Hefford v. *Alger*. 1 W. P. T. 218

12. If the plaintiff in replevin is nonsuited, the defendant is not bound to have his damages assessed by the jury under stat. 17 *Car.* 2. *c.* 7. or to take the earliest moment to prosecute his writ *de retorno habendo*. And he may again distrain the same goods for rent subsequently accrued, previously to his executing his *returno habendo*, without waiving his action against the sureties in the bond. 1 W. P. T. 218

13. A replevin bond may, under stat. 11 *G.* 2. *c.* 19. be assigned to the avowant only, and he may bring his action upon it without joining the party making cognizance. *Archer* v. *Dudley*. *E.* 22 *G.* 3. 1 B. & P. 381, *n.*

14. The court will stay proceedings in replevin on payment into court of the rent avowed for, and payment also of the costs of the action.
Vernon v. *Wynne* (*Bart.*) 1 H. B. 24

15. So before avowry, on payment of the rent due and costs up to the time, including those of the application.
Hopkins v. *Shrole*. 1 B. & P. 382

16. But not upon payment of the rent, and of the costs to the time of a tender which had been made of such rent and costs, after the distress and before the replevin. *ib.*

17. Nor upon payment of costs, on the application of the defendant; though no special damage were assigned in the declaration.
Hodgkinson v. *Snibson*. 3 B. & P. 603

18. An avowant in replevin for rent in arrear, for whom verdict and judgment are given below, which are affirmed on a writ of error, is not entitled to be allowed interest on the sum recovered, by force of the stat. 3 *H.* 7. *c.* 10, which is confined to judgments recovered by plaintiffs below, and affirmed on a writ of error.
Golding v. *Dias*. 10 E. R. 2

19. The condition of a replevin bond is not satisfied by a prosecution of the suit in the county court; but the plaint if removed by *re. fa. lo.* into a superior court, must be prosecuted there with effect, and a return made if adjudged there.
Gwillim v. *Holbrook*. 1 B. & P. 410

20. The plea *de injuriâ suâ propriâ absque tali causâ* to cognisance for rent in arrear, is bad upon special demurrer.
Jone v. *Kitchin*. 1 B. & P. 76

21. The 11 *G.* 2. *c.* 19. respecting avowries in replevin does not extend to an avowry for a rent charge.
Bulpit v. *Clarke*. N. R. 56

22. The defendant in replevin having made cognizance for rent service as bailiff of *A.*, *B.*, and *C.*, who were lawfully possessed of a certain manor of which the *locus in quo* was parcel, and holden at a certain rent; the plaintiff replied, that *A. B.* and *C.* were not seised in their demesne as of fee of the manor; held bad on demurrer. *ib.*

23. A defendant in replevin is not entitled to move for judgment as in case of nonsuit under stat. 14 *G.* 2. *c.* 17. § 1. *Shortridge* v. *Hiern*. 5 T. R. 400 (And see *Jones* v. *Concannon*, JUDGMENT II. 2.)

24. One tenant in common cannot avow *alone* for taking cattle *damage feasant*, but he ought also to make cognisance as bailiff of his companion.
Culley v. *Spearman*. 1 H. B. 386

25. A declaration in replevin by J. S. and his wife, without shewing any cause for joining the wife is bad on demurrer.
Serres & ux. v. *Dodd*. 2 N. R. 405

26. A judgment in replevin "that the defendants have a return of the cattle, and recover their damages and costs assessed by the jury," &c. is good either as a judgment at common law, though the return be not judged irreplevisable, or as a judgment under stat 21 *H.* 8. *c.* 19. which entitles the defendants to damages and costs.
Gampon v. *Jones*, (*in error*) 4 T. R. 509

27. When the defendant in replevin made cognisance for two years and a quarter's rent in arrear; and alledged that for a long time, viz. *for two years and a quarter, ending at* Christmas, 1803, the plaintiff *held and enjoyed* the pre-

mises *as tenant thereof* to *A. B.* by virtue of a certain demise, &c.; to which the plaintiff pleaded in bar, that he did not *hold and enjoy* the premises as tenant thereof to *A. B.* by virtue of the supposed demise *modo & forma;* it is sufficient to entitle the defendant to a verdict on such issue if he prove that the plaintiff held of *A. B.* from the 23d of *Dec.* 1801; and to recover for *two years'* rent.

Forty v. *Imber.* 6 E.R.434

RIOT.

1. The hundred are not liable in an action for damages brought by the person injured by a mob beginning to pull down his house, *&c.* unless the riot be of such a kind as to amount to felony within stat 1 *G.* 1 st. 2. *c.* 5.

Reid v. *Clarke & al.* 7 T. R. 496

2. In that case the breaking of the plaintiff's windows by a mob, because he would not illuminate his house on a particular occasion, was held not to be within the act. 7 T. R. 496

3. Where a mob attacked a baker's house and broke the glass and shutters of the windows, and compelled him to sell flour at a price named by themselves, below the marketable value: held, this was evidence for the jury of a felonious beginning to demolish the house, &c. within the 4th section of the riot act; and that the plaintiff might recover for the damage done to the *house,* in an action against the hundred of the 6th section, but not for the value of the flour so sold; that not being consequential to the act of demolition: nor could he recover for the value of other flour taken and wasted in another warehouse distinct from his dwelling-house, on the opposite side of the street, of which the lock only was burst; that not being a beginning to demolish, &c. within the act, with the view with which it appeared to have been done.

Burrows v. *Wright.* 1 E. R. 615

4. Where a mob, after beginning to demolish and pull down a house, steal flour therein, or force the owner to sell it at an under price, the value thereof cannot be recovered in an action against the hundred of the 6th section of the riot act, 1 *G.* 1. stat. 2. *c.* 5. such stealing and robbery being substantive felonies, and not within the offence created by the 4th section of the act. But flour which was spoiled or destroyed at the time of such beginning to demolish, &c. may be so recovered.

Greasley v. *Higginbotham.* 1E.R.636

5. To support an action against the hundred for damages on stat. 1 *G.* 1. stat. 2. *c.* 5. for the riotous demolition of a house, it is not necessary to prove that twelve rioters were assembled at the time.

Pritchet v. *Waldron.* 5 T. R. 14

6. Such an action is maintainable by a trustee, in whom the legal estate is vested for existing purposes, and (as it seems) even by a bare trustee of a satisfied term. 5 T. R. 14

7. An order of justices for the levying of money upon the inhabitants of an hundred under the riot act, directing that the money, when levied, shall be paid into the hands of a banker, subject to their further order, is bad.

R. v. *Halfshire* (*Inhab.*) 5 T. R. 341

8. The money should be directed to be paid to the party entitled. 5 T. R. 341

9. A writ of execution sued out by the party who has recovered damages against the hundred, and delivered by the sheriff to the justices, is a good foundation for an order to levy the amount.—*Semble.* 5 T. R. 341

10. The order for levying the damages ought to be upon the inhabitants of the "towns, parishes, villages, and hamlets," pursuant to stat. 27 *Eliz. c.* 13., and not upon the inhabitants of the "districts and parishes" within the hundred. 5 T. R. 341

11. If a mob riotously and by force demolish a gaol, by which the debtors escape, the sheriff or gaoler is answerable in an action on the case to the creditors for their escape. *Elliot* v. *The Duke of Norfolk.* 4 T. R. 789

RIVERS.

1. The public are not entitled at common law to tow on the banks of ancient navigable rivers.

Ball v. *Herbert.* 3 T. R. 253

2. The right must be founded either on statute or on usage. 3 T. R. 253

3. If an act of parliament for inclosing and allotting the common and waste lands of a parish through which a navigable river flows, empower commissioners to set out such public and private roads and ways as they shall think necessary, and direct that all roads and ways not set out shall be deemed part of the lands to be allotted, an ancient

towing path on the bank of the rivet, though not set out by the commissioners, still subsists, for it is not within their jurisdiction.

Simpson v. *Scales.* 2 B. & P. 496

4. The owner of land through which a river runs, cannot, by enlarging a channel of certain dimensions, through which the water had been used to flow before any appropriation of it by another, divert more of it to the prejudice of any other land owner lower down the river, who had at any time before such enlargement appropriated to himself the surplus water which did not escape by the former channel.

Bealey v. *Shaw.* 6 E. R. 209

5. The Medway Navigation Company being empowered to make the river navigable, and to take tolls, and to amend or alter bridges or highways, leaving them or others convenient in their room, having destroyed a ford across the river in the common highway by deepening its bed, and having built a bridge there, are bound to keep such bridge in repair.

R. v. *Kent* (*Co. Inhab.*) 13 E. R. 220

S.

SCHOOL.

Masters of grammar schools must be licensed by the ordinary, who may examine the party applying for a license as to his learning, morality, and religion.

R. v. *Archbishop of York.* 6 T. R. 490

SCIRE FACIAS.

1. A *scire facias* is an action.

Winter v. *Kretchman.* 2 T. R. 46

2. A *scire facias* to revive a judgment, entered on a bond securing an annuity, granted before statute 17 *G.* 3. *c.* 26. § 2., commanding that no *action* shall be brought on any judgment already entered (unless certain requisites were complied with), is an action within that clause.

Fenner v. *Evans.* 1 T. R. 267

3. A *scire facias* to revive a former judgment is so far a continuation of the same action, that if the plaintiff's testator had agreed not to bring a writ of error in that former action, such agreement shall bind his executors, upon the *scire facias* being brought against them. *Executors of Wright* v. *Nutt (in error).* 1 T. R. 388

4. Judgment being entered on a bond to secure the quarterly payment of an annuity, and a *fi. fa.* having issued for the arrears of the last half year, a second *fi. fa.* may be taken out for the next quarter, *without reviving the judgment* by *scire facias.*

Scott v. *Whalley.* 1 H. B. 297

5. A *scire facias* on a judgment must pursue the terms of the judgment.

Mara v. *Quin, Executrix.* 6 T. R. 1

6. Therefore where an executor pleads *plene administravit*, and the plaintiff does not take issue on it, but takes a judgment of assets *quando acciderint*, the *scire facias* on that judgment must only pray execution of such assets as have come to the executor's hands since the former judgment; and if it pray execution of assets generally, without confining it to that time, it cannot be supportrd. 6 T. R. 1

7. A *scire facias* must lie in the sheriff's office the last four days before the return. *Forty* v. *Hermer.* 4 T. R. 583

SEISIN.

1. *A.* died seised leaving two infant daughters by different venters: held, that an entry generally, by the mother of the youngest daughter as her guardian in socage, constituted a sufficient seisin in the eldest infant daughter to carry the descent of her moiety, on her death, to her heirs. *Doe d. Barnett & al.* v. *Keen.* 7 T. R. 386

2. The distinction taken is, that if a father die, his estate being out on a *freehold* lease, that is not such a possession as to induce the *possessio fratris*, unless the elder son live to receive rent after the expiration of such lease: but if the father's estate were out at his death on a lease for *years* only, the possession of the tenant is a sufficient possession of the elder son to constitute the *possessio fratris.*

7 T. R. 386

3. The head of a college hath not such an estate in his office as will entitle him to maintain an assize for it; for he hath no sole seisin. 2 T. R. 355

4. A writ of right cannot be maintained without shewing an *actual seisin by taking the esplees*, either in the demandant himself, or the ancestor from whom he claims.
Dally v. *King*. 1 H. B. 1
5. The demandant in a writ of right must allege in his count that his ancestor was seised *of right*, as well as that he was seised *in his demesne as of fee*. *Dowland* v. *Slade & Ux.* 2 B. & P. 570: 5 E. R. 272
6. *Qu.* Whether if one through whom title is derived be improperly stated to be heir to her brother, who it appears by the record, had a son who survived him, and through whom title is properly derived, such erroneous appellation of the sister as heir to her brother, be fatal? *ib.*
7. In the count of a writ of right, it is not sufficient to state that the lands descended to four women as nieces and co-heirs of *J. S.* without shewing how they were nieces.
Dunsday v. *Hughes*. 3 B. & P. 453

SESSIONS.

1. Whether, when the Sessions state facts fully and particularly, from which they infer fraud, the Court of *B. R.* can draw their own conclusion from those facts, without regard to the adjudication of the Sessions? *Qu.*
R. v. *Woodland (Inhab.)* 1 T.R. 261
[That the court will in no case presume fraud. See 2 T. R. 711; *per Kenyon*, C. J.]
2. If the Sessions draw a conclusion of fact that the taking of a tenement is fraudulent, or that it does not amount to 10*l. per annum*, it is decisive in K.B. though they state all the facts: and refer the consideration of those questions to the court.
R. v. *Llanwinio (Inhab.)* 4 T.R. 473
3. When the Sessions adjudge a place to be a vill by reputation, as a substantive fact, this court is precluded from going into the question, notwithstanding the Sessions state all the evidence particularly, on which they formed their opinion.
R. v. *Ronton Abbey (Inhab.)* 2 T.R. 207
4. Though the Sessions find that certain persons in the township were possessed of visible stocks in trade there, and were personally liable to be rated in respect thereof, if by law such property were liable to be rated: yet if they also state that they were not satisfied, from the evidence offered before them, that there was any surplus profit on such stocks, by which they could amend a rate which omitted them; that concludes the question.
R. v. *Sir A. M'Donald, &c.* 12 E.R. 324
5. The Court of *B. R.* ordered the Sessions to inquire into a fact, which appeared doubtful on the original order of removal, even though the Sessions stated no case for the opinion of the court. *R.* v. *Margam*. 1 T. R. 775
6. The court will not send a case down to the Sessions to be restated, on a mere formal objection, if enough appear to enable them to decide according to the merits of the case.
R. v. *Middlezoy (Inhab.)* 2 E.R. 41
7. The Sessions should state as a fact (in a settlement case), whether the master dispensed with the service before the end of the year, or whether there were a dissolution of the contract by mutual consent. *R.* v. *St. Peter, Norwich (Inhab.)* 8 T.R. 477
8. It is a great irregularity to reserve a case for the opinion of the Court of K. B. upon the trial of an indictment at the Quarter Sessions; and the Court of Quarter Sessions have no power so to do.
R. v. *Salop (Co. Inhab.)* 13 E. R. 95
9. If a court of *General Quarter Sessions*, next after an order of bastardy, quash the order, this court will not intend that a court of *General Sessions* intervened; and, unless that appear, the order of Sessions will be confirmed.
R. v. *Chichester, Guardians of the Poor*. 3 T. R. 496
10. Justices at Sessions appointed a committee of twelve magistrates to inspect the state of a county barge, and to make any new contract for repairing or rebuilding, to be executed by the clerk of the peace, on behalf of the county: afterwards they made an order, adopting a contract for rebuilding, proposed by the committee, and directed to be prepared by the clerk of the peace, which contract having been afterwards executed by the clerk, the justices at a subsequent Sessions confirmed all the resolutions of the committee, and ordered the clerk to perform their directions in respect to the contract: the acts of the committee so confirmed are the acts of the Sessions, and the authority given to the committee, and exercised by them, is not such a delegation of power

by the Sessions as will invalidate their orders. *R.* v. *Glamorganshire (Justices.)* 5 T. R. 279

11. The Sessions have no jurisdiction over the offence of forgery at common law, nor can they take cognizance of it as a cheat *R.* v. *Micah Gibbs.* 1 E. R. 173

12. Therefore they cannot hold cognizance of an indictment charging that the defendant being a person assessed to certain duties granted upon income, by certain commissioners, and under pretence of being aggrieved, having appealed to certain other commissioners, and contriving and intending to deceive the said last-mentioned commissioners, and to induce them to believe that the particulars of his income delivered in, and the deductions claimed by him to be allowed, had been inquired into, examined, and approved by one *Richard Else*, then being clerk to the first-mentioned commissioners, and with fraudulent intent to give effect to his appeal, and to evade the duty at the bottom of a paper purporting to be a schedule of the defendant's income, did forge, &c. the letters *R. E.* purporting to be the initials of the said clerk, and did exhibit to the Commissioners of Appeal the said paper, &c, against the peace, &c. *ib.*

13. But it was not denied that they had jurisdiction over cheats in general, and in *R.* v. *Brayne, Mich.* 12 *G.* 1. and *R.* v. *Reale, East.* 38 *G.* 3. the court of *B. R.* gave judgment as for a cheat, on indictments respectively removed from the Sessions by *certiorari*. *ib.* 183

14. To solicit a servant to steal his master's goods is a misdemeanor, though it be not charged in the indictment that the servant stole the goods, nor that any other act was done except the soliciting and inciting: and such offence is indictable at the Sessions, having a tendency to a breach of the peace. *R.* v. *Higgins.* 2 E. R. 5

15. The Sessions have cognizance of all offences which tend to a breach of the peace; except forgery and perjury. *Per Lord Kenyon.* 2 E. R. 18

16. A party appealing to the Sessions is not thereby concluded from afterwards disputing its jurisdiction in the particular case. *Lowther* v. *Radnor (Earl) & al.* 8 E. R. 113

17. No appeal lies to the Sessions against a conviction and commitment in execution for three months of a collier under stat. 6 *G.* 3. *c.* 25., for absenting himself from his master's service; the clause of appeal in that statute excepting *an order of commitment*; and the order of commitment in question containing a conviction of the collier for an offence within the act. *R.* v. *Staffordshire (Just.)* 12 E. R. 572

18. Though a statute, giving an appeal to the Sessions within a certain time, direct the justices at *the said* Sessions to determine the appeal, yet they have a power of adjourning it, on sufficient cause, of which they are to judge: *Semb.* *R.* v. *Wilts (Justices.)* 13 E. R. 352

19. By an act for making and maintaining the *Glamorganshire* canal, power is given to the canal company to make all such works as they shall think necessary and proper for "effecting, "completing, maintaining, improving, "and using the canal, and other "works;" and the company are required to lay before the Sessions an account of the sums expended in making and completing the canal, up to the time of its completion; and after that, an *annual account* of the rates collected, *and of the charges and expenses of supporting, maintaining, and using the navigation and its works:* and the Sessions are authorized, in case it appears to them that the clear profits exceed the per centage, limited by the act on the sums mentioned in the first account to have been expended by the company (i. e. in making and completing the canal and its works), to reduce the canal rates; held that the Sessions, even after the period fixed for the completion of the canal, and after the first account delivered of the capital expended in the undertaking, and on which the dividends were to be calculated, were not authorized to reject charges and expenses, stated in the annual account of disbursements, for *new* works, such as a reservoir and steam-engine, which the company deemed necessary, and proved by evidence to have been erected *for the support and improvement of the original line of canal, and for the better supplying it with water in dry seasons.* Though it seems that if the new works had been shewn to be merely colourable, and erected for purposes collateral to the navigation authorized by the act of parliament, such charges would have been rightly rejected by the Sessions. *R.* v. *Glamorganshire Canal Company.* 12 E. R. 157

SET-OFF.

1. A plea of set-off that the plaintiff was indebted to the defendant *at the time of the plea pleaded*, is bad; it should state that he was indebted *at the commencement of the action.*

Evans v. *Prosser.* 3 T. R. 186

2. It is no objection to a plea of set-off that the defendant has brought an action against the plaintiff for the same sum in which the plaintiff has paid the amount of the demand into court.

3 T. R. 186

3. In an action on a bond, the defendant must set forth in the plea what is really due on the bond, before he is entitled to set off any cross demand under stat. 8 *G.* 2. *c.* 24. § 5: and such averment is traversable.

Symmonds v. *Knox*, 3 T. R. 65

And *Grimwood* v. *Barrit.* 6 T. R. 460

4. Mutual credit may be constituted though the parties do not mean particularly to trust each other; as if a bill of exchange accepted by *A.* get into the hands of *B.*, and *B.* buy goods of *A.*, there is mutual credit between *A.* and *B.* which may be set off by *B.*, though *A.* did not know when he let *B.* have the goods that such bill was in his hands. *Hankey* v. *Smith*

E. 29 *G.* 3. 3 T. R. 507, *n.*

5. There can be no set-off to an avowry for rent. *Sapsford* v. *Fletcher*, 4 T. R. 511;—and *Graham* v. *Fraine*, and *Laycock* v, *Tuffnell*, *E.* 27 *G.* 3.

4 T. R. 123, *n.*

6. To an action of covenant for rent by a landlord, the defendant cannot set off any uncertain damages that he may be entitled to recover against the landlord on any of the covenants in the lease. *Weigal* v. *Waters.* 6 T. R. 488

7. A debt due to a defendant, as a surviving partner, may be set off against a demand on him in his own right.

Slipper v. *Stidstone.* 5 T. R. 493

8. *French* v. *Andrade.* 6 T. R. 582, S. P.

9. The same point was stated *arguendo* by *Buller J.* in *Smith* v. *Barrow.*

2 T. R. 478

10. Where there were three defendants, one went to trial and obtained a verdict, but the two others suffered judgment by default. The Court of C. P. permitted the costs and damages, on the judgment by default, to be deducted from the costs taxed on the postea to the defendant who had a verdict; and in answer to the objection that this tended to deprive the attorney of his legal lien, the Court said that the attorney could only have such a lien on the costs as was subject to the equitable claims of the parties in the cause.

Schoole v. *Noble & al.* 1 H. B. 23

11. And that court affirmed this doctrine, in a case where several actions brought on two policies of assurance, underwritten by the same parties (among whom were *A.* and *B.*) were respectively consolidated. In one of the causes, which went to trial, *A.* was defendant, in the other *B.*; the plaintiff became entitled to costs in one action, and the defendant in the other.—The costs taxed and allowed to the defendant were set off against those taxed and allowed to the plaintiff.

Nunez v. *Modigliani.* 1 H. B. 217

12. *A.* having obtained a verdict against *B.* for a small sum, and *B.* having previously recovered judgment against *A.* for a larger sum and taken him in execution, the court (of C. P.) permitted the sum recovered by *A.* by the verdict and the costs, to be deducted from the amount of the judgment of *B.*, and satisfaction to be entered for so much, notwithstanding *A.* was insolvent, and had no means of paying his *attorney's bill*, but by the sum for which he obtained the verdict.

Vaughan v. *Davies* 2 H. B. 440

13. That court also allowed the costs recovered by *A.* against *B.* in one action, to be set off and deducted from the damages and costs recovered by *B.* against *A.*, *C.*, and *E.*, in another action; notwithstanding the attorney of *B.* swore that he believed *B.* to be insolvent, and that there was no fund out of which the attorney's costs could be paid, but the damages and costs so recovered by *B.*

Dennie v. *Elliot & al.* 2 H. B. 587

14. That court also allowed the costs of two actions between the same parties, though in two different courts, to be set off against each other, notwithstanding the attorney's lien; but *Ld. Eldon*, C. J. strongly expressed his opinion of the propriety of reconsidering the practice of the court in this particular. *Hall* v. *Ody.* 2 B. & P. 28

15. In a subsequent case, nevertheless, the court allowed the costs upon a nonsuit to be set off against costs due from the defendant upon the removal of an indictment against him from the Sessions to the court of K. B., notwith-

standing the attorney's lien; and declared that an attorney acts upon the credit of his client, his lien cannot be allowed to interfere with the equitable arrangement of costs between the parties to the suit.

Embden v. *Darley*. 1 N. R. 22

16. The plaintiff is entitled to set off interlocutory costs in the same cause, payable by him to the defendant, against the debt and costs recovered by him on the final result of the cause; notwithstanding the objection of the defendant's attorney on the ground of his lien, which only attaches on the general result of the costs, &c.

Howell v. *Harding*. 8 E. R. 362

17. In a cross action, the defendant may on motion set off the debt against a judgment for a greater sum, and the court will stay proceedings thereon.

Peacock v. *Jeffery*. 1 W. P. T. 426

18. If an execution be set aside with costs, as having been sued out after the allowance of a writ of error, the court will not permit the costs of the application to be set off against the costs of the action, but will compel the plaintiff to pay them forthwith.

Hill v. *Tebb*. N. R. 311

19. Where *A.* recovered against *C.*, and *C.* recovered against *A.* and *B.*, the court of K. B. permitted *C.*, on motion, to set off the damages which he had recovered against those obtained by *A.* on his undertaking that the bill of *A.*'s attorney in the first action should be satisfied, that court holding that he had a general lien on the judgment for his costs.

Mitchell v. *Oldfield*. 4 T. R. 123

And see *Randall* v. *Fuller*. 6 T. R. 456 (And see tit. ATTORNEY III.)

20. The court of K. B. also permitted three defendants to set off a judgment, recovered by them against the plaintiff against a judgment obtained by the plaintiff against them jointly; (subject to the attorney's lien), though the plaintiff had also a separate demand on one of the defendants.

Glaister v. *Hewer*. 8 T. R. 69

21. A judgment recovered by *A.* against *B.* and *C.*, will not be set off on application to the general jurisdiction of the court, against another judgment recovered against *A.* by the assignees of *B.* under an insolvent debtors' act; the interest of third persons intervening, who have peculiar trusts by the statute. *Doe* v. *Darnton*. 3 E. R. 149

22. *A.* brings an action against *B.*, the expenses of defending which are borne by *C.* and *D.*, but *A.* is nonsuited. Afterwards *C.* brings an action against *A.*, in which D. is interested as well as *C.*, and *C.* is nonsuited.—The costs of the one nonsuit were allowed by the court of C. P. to be set off against the other.

O'Connor v. *Murphy*. 1 H. B. 657

23. No action will lie in the courts at *Westminster* to recover costs ordered to be paid by a rule of an inferior court, in the course of a suit there, notwithstanding the defendant should not be liable to an attachment of the inferior court, by being resident out of its jurisdiction. But such an action having been brought, the court of C. P. ordered the costs awarded to the plaintiff in the inferior court to be deducted from those allowed to the defendant in the action.

Emerson v. *Lashley*. 2 H. B. 247

24. But though it be clear that the mere order of another court is not a good ground of action; yet an agreement between parties to a suit in Chancery binding themselves, their executors, and administrators, made an order of that court, and acted upon therein as such, may be the ground of an *assumpsit* at law. *Smith* v. *Whalley*. 2 B. & P. 482

25. A broker with a commission *del credere* cannot prove under a notice of set-off a loss upon a policy, happening before a bankruptcy, in an action by the assignees of the bankrupt for premiums upon policies underwritten by him, and for which he had debited the broker; but such a loss may be set off under the general issue,

Grove v. *Dubois*. 1 T. R. 112

26. Where a bankrupt has underwritten a policy to a broker acting under a commission *del credere*, and a loss upon the policy happens before, but is not adjusted till after the bankruptcy, the broker may deduct the amount of the loss from the debt which he owes to the estate of the bankrupt.

Bize v. *Dickason*. 1 T. R. 285

27. If a factor, who sells under a *del credere* commission, sell goods as his own, and the buyer know nothing of the principal, the buyer may set off any demand he may have on the factor, against the demand for the goods made by the principal.

George v. *Clagett*. 7 T. R. 359

28. *A.* first purchased one and afterwards another parcel of goods of *B.*, each at six months' credit; when the first sum became due, *A.* lodged in *B.*'s hands a bill of exchange for a larger amount than the value of the goods in order to pay for them, *B.* engaging to return to *A* the overplus when the bill should be paid; *B.* received the amount of the bill, and then *A.* became a bankrupt, not having paid for the second parcel of goods: held, in an action brought by *A.*'s assignees for the surplus of the bill, that *B.* might retain it to satisfy his demand on *A.* for the second parcel of goods.

Atkinson v. *Elliott*. 7 T. R. 378

29. Where an agreement was made between one, who afterwards became a bankrupt, and the defendant, that a loss upon cotton, which the latter had sustained by means of the former, should be fixed at 1900*l.*; and that in satisfaction of that sum the bankrupt should for four years recommend certain parcels of cotton to the defendant, which he should purchase by notes at three month's date, the clear produce on the sale of which the bankrupt undertook should amount to that sum, in default of which he was to make good the deficiency, if living; it was held such sum could not be set off by the defendant against a demand made by the assignees of the bankrupt.

Huncock v. *Entwistle*. 3 T. R. 435

(See BANKRUPT V.)

30. An allegation of an agreement to set off a specific joint debt, against specific separate debts previously accrued, is in substance proved by evidence of an agreement prior to the debts accruing to set off all joint debts that should thereafter arise against all separate debts that should thereafter arise. *Kinnerley & al.* v. *Hossack*. 2 W.P.T. 170

31. Where the defendant lent his acceptance to the bankrupt on a bill, which did not become due till after the act of bankruptcy, and was then outstanding in the hands of third persons, yet the defendant having paid the amount after the commission issued, and before the action brought by the assignees, is entitled to set off the same under the words "mutual credit" in stat. 5 *G.* 2. *c.* 30. § 28.

Smith v. *Hodson*. 4 T. R. 211

32. To an action brought by the assignees of a bankrupt for a debt due to the bankrupt's estate, the defendant cannot set off cash notes issued by the bankrupt payable to bearer, bearing date before his bankruptcy, unless he shew further that such notes came to his hands before the bankruptcy.

Dickson v. *Evans*. 6 T. R. 57

33. But if the notes had been made payable to the defendant himself, that would have been reasonable evidence of their having come to his hands at the time they bore date. 6 T. R. 57

34. If two persons agree to perform certain work in a limited time, or to pay a stipulated weekly sum for such time afterwards as it should remain unfinished, and a bond is prepared in the name of both, but is executed by one only, with condition for the due performance of the work, or the payment of the weekly sum, and the work is not finished at the time: such weekly payments are not by way of penalty, but in the nature of liquidated damages, and may be set off by an obligee in an action brought against him by the obligor who executed.

Fletcher v. *Dyche*. 2 T. R. 32

(And see PENALTY.)

35. Where a prisoner in execution is discharged by the consent of his creditor, upon giving a fresh security to satisfy the judgment, and that security is afterwards set aside on account of a mere informality, the judgment is satisfied, and cannot be set off against a demand of the prisoner.

Jaques v. *Withy*. 1 T. R. 557

36. *C.*, by virtue of an order from *B.* to receive all money due to him on a particular account, obtains three out of four instalments due from *A.* to *B.* on that account; these payments are afterwards questioned by *B.*, who brings his action against *A.* for the whole sum, and at the same time *C.* demands his fourth instalment; an application to the Court of C. P. by *A.* to stay proceedings in an action against him by *B.*, on his paying the fourth instalment to such person as the Court shall appoint, was refused by C. P.

Macdonald v. *Pasley*. 1 B. & P. 161

37. In *assumpsit* for goods sold and delivered, defendant pleaded a set-off of more money due to him from the plaintiff. A replication, that the goods were agreed to be paid for in *ready money*, was holden bad on demurrer, being no answer to the plea.

Eland v. *Karr*. 1 E. R. 375

38. But in estimating the plaintiff's damages in such case, the jury should take into their consideration, the loss he had sustained by non-payment of ready money. *ib.* 377

SEWERS.

1. The stat. 23 *H.* 8. *c.* 5. § 17. having directed that "*laws, acts decrees and ordinances*" made by commissioners of sewers shall stand good and be put in execution *so long time as their commission endureth, and no longer*, except "the said laws and ordinances" be engrossed in parchment, and certified under the seals of the commissioners into Chancery, and have the royal assent: and the stat. 13 *Eliz.* *c.* 9. having directed all commissions of sewers to continue in force for ten years, unless sooner determined by supersedeas or any new commission; and that all "*laws, ordinances, and constitutions,*" made by force of such commission, *being written in parchment, indented and under seals,* &c., shall, without such certificate or royal assent, continue in force notwithstanding the determination of the commission by supersedeas, until repealed or altered by new commissioners; and that all such *laws, ordinances, and constitutions,* written *in parchment, indented, and sealed, &c.* shall, without certificate or royal assent, continue in force *for one year* after the expiration of such commission by lapse of ten years from its teste; held,

1st. That the *laws, acts, decrees, and ordinances,* mentioned in the stat. of *Hen.* 8. mean the same as the *laws, ordinances, and constitutions,* mentioned in that of *Elizabeth.* And,

2dly. That a *decree* made by commissioners under a former commission which had expired by lapse of ten years, directing a sea wall to be refounded, which had been destroyed by a violent tempest and inundation, and the sums necessary for its construction to be advanced by those who were before bound to sustain it *ratione tenuræ* (and who did advance the money accordingly), and that a rate should be made on the level for their reimbursement; (although such decree had been written in *parchment, indented, and sealed,* which this was not), could not be enforced by commissioners under a *new* commission, issued more than a year after the expiration of the former commission; as to so much of it as remained unexecuted: though good to the extent to which it had been executed; and therefore the Court refused a *mandamus* to the new commissioners to direct a rate to be levied on the level for the reimbursement directed by the decree. *R.* v. *The Commissioners of Sewers, Somerset.* 9 E. R. 109

2. *Callis's* Readings are good authority on the subject of sewers. 2 T. R. 365

3. The commissioners of sewers have jurisdiction over a sewer communicating with a navigable stream, or with the sea above the point where the tide ebbs and flows, if it be useful for navigation, and if the place over which the jurisdiction is exercised is or is likely to be benefited by it.

Dore v. *Gray.* 2 T. R. 358

4. If a sea bank or wall, which the owners of particular lands are bound to repair, be destroyed by tempest, without any default in such owners, the commissioners of sewers may order a new one (even in a different form, if necessary) to be erected, at the expense of the whole level. *R.* v. *Somersetshire Commissioners of Sewers.* 8 T. R. 312

5. A presentment made by a standing jury constituted according to ancient usage originally returned by the sheriff at the commencement of every new commission of sewers from certain parishes or districts, composed of landowners then interested in disclaiming the general charge on the level, which jurymen generally acted for life, and only the foreman of which was summoned by the sheriff, which foreman convened the said jurymen, is illegal and void. *R.* v. *Commissioners of Sewers, Somersetshire.* 7 E. R. 70

6. Such juries, by 23 *H.* 8. *c.* 5. ought to be summoned by the sheriff from the body of the county. 7 E. R. 70

7. And the presenting jury after being sworn and charged must also prosecute their enquiry upon hearing evidence on oath before the commissioners in court, and make their presentment thereon, and not on information collected in the country without oath. 7 E. R. 70

SHERIFF.

I. *Bailiff: for what acts of his the Sheriff shall be liable, &c.*

1. For all *civil* purposes the act of the bailiff is the act of the sheriff. 2 T. R. 148

2. In an action of trespass against the sheriff for a wrongful act of the bailiff, it is not enough, in order to affect the sheriff, to prove that he is a general bailiff and had given a bond of indemnity to the sheriff as such, and to prove a copy of the warrant under which he entered and seized the plaintiff's goods; but the privity between the bailiff and the sheriff must be established in the particular transaction on the best evidence, by proving the original warrant of execution from the sheriff to the bailiff, or at least by proving notice to produce it, so that in case of its not being produced, secondary evidence of its contents may be let in. *Drake* v. *Sykes, (Bart.)* 7 T. R. 113

3. The sheriff having directed a warrant to *A.* and all his other officers to arrest *B.*, *A.* afterwards inserted the name of *C.*: held, that the warrant was illegal, and the arrest by *C.* consequently void. *Housin* v. *Barrow.* 6 T.R. 122

4. It seems that an action may be maintained against the sheriff for the penalty given by stat. 29 *Eliz. c.* 4. for the acts of his bailiff. 2 T. R. 155-8

5. The sheriff and bailiff are not both answerable in an action for a penalty for the same act. 2 T. R. 712

6. If the sheriff appoint a special bailiff at the plaintiff's request, the latter cannot rule the sheriff to return the writ. *De Moranda* v. *Dunkin.* 4 T.R. 119

7. But the sheriff is even in such case, responsible for the defendant after an arrest made, though in another suit. *Taylor* v. *Richardson.* 8 T. R. 505

8. A return made by the sheriff that the person arrested was rescued out of the custody of the bailiff, is bad; it it should be out of *his* custody. *Woodgate* v. *Knatchbull.* 2 T. R. 155

9. If a sheriff's officer on an arrest take an undertaking for the appearance of the party, instead of a bail-bond, without the plaintiff's assent, and bail above is not duly put in, the sheriff is liable to an action for an escape, and the court will not relieve him by permitting him to put in and justify bail afterwards. *Fuller* v. *Prest.* 7 T. R. 109

10. And the Court of C. P. refused to permit the defendant to justify bail, after an action for an escape commenced, where no bail bond had been taken. *Webb* v. *Matthew.* 1 B. & P. 225

11. But if the sheriff permit the defendant to get at large without taking a bail-bond, he may retake him before the return of the writ. *Atkinson* v. *Matteson.* 2 T. R. 172 And vide 7 T. R. 109

12. Debt lies upon the stat. 44 *G.* 3. *c.* 13. § 4. by a common informer, suing for himself and the king, to recover a penalty against the sheriff for the misconduct of his bailiff in wilfully suffering a seaman to go at large who had been taken out of the king's service by arrest on civil process, on which he was afterwards bailed, instead of delivering him over to the charge of a proper naval officer: the statute which speaks of *sheriffs, gaolers, or other officers* arresting, apprehending, or taking in execution such seamen, or in whose custody they may be, and who are made liable for their escape, meaning by "other officers," such as may be charged with the execution of criminal warrants against such seamen, or to whom any process may properly be directed for their arsest, detention, or discharge; and not the inferior officers of the sheriff. And the sheriff may be charged in such action for *wrongfully* and *wilfully* permitting the escape. *Sturmy q. t.* v. *Middlesex Sheriff.* 11 E. R. 25

13. The sheriff having arrested a party, permitted him to go at large without taking a bail-bond, returned *cepi corpus*, and before the expiration of the rule to bring in the body put in bail; held that he was not liable either to an action of escape, or false return. *Pariente* v. *Plumbtree.* 2 B.&P. 35

14. If after the commencement of an action of escape against the sheriff for not taking a bail-bond, good bail be put in an justified in the room of bail before put in, who by the practice of the court were a mere nullity, the plaintiff cannot recover. *Allingham* v. *Flower.* 2 B.& P. 246

15. But where the sheriff omitted to take a bail-bond upon the arrest, and afterwards, upon an action being commenced against him for an escape, caused bail to be perfected, the Court of C. P. ordered the allowance of bail to be set aside, that the action might proceed. *How* v. *Lacy.* 1 W. P. T. 119

16. After a party arrested on civil process has been discharged, on giving a bail-bond to the sheriff for his appearance at the return of the writ, it is optional in the sheriff whether he will accept the surrender of the party in

discharge of the bail-bond before the return of the writ; and therefore, though notice of such surrender were given to the sheriff, and the gaoler in whose custody the party then was at the suit of another; after which the gaoler let the party out of custody; yet held that the gaoler was not liable upon his bond of indemnity to the sheriff, as for an escape in the former suit; for the party was not legally in the custody of the sheriff or his gaoler merely by virtue of such notice of surrender. *Hamilton* v. *Wilson*. 1 E.R.383

17. The security to the sheriff under 23 *H.* 6. *c.* 9., must be in the particular form marked out by the statute, otherwise it is void; and this statute requires the bond to be given to the *sheriff*, as such, for the *appearance* of the party, and for no other purpose. *Rogers* v. *Reeves*. 1 T. R. 421, 2

18. The obligation being given to the sheriff's bailiff is bad, for it must be to such officer as has the return of process. 1 T. R. 421, 2

II. *His Authority; Exemption, &c.*

1. If, at a county court held for the election of knights of the shire, a freeholder interrupt the proceedings, by making a great noise and disturbance, the sheriff may order him to be taken into custody, and carried before a justice of the peace. It is sufficient, in a plea of justification to an action for an assault and false imprisonment, brought against the sheriff under the above circumstances, to state, "that the plaintiff made a great noise and disturbance at the election, and then and there obstructed and molested the defendant in the execution of his duty," without stating that he *thereby* obstructed and molested him. *Spilsbury* v. *Micklethwaite*. 1 W. P. T. 146

2. The payment of the fine fixed by statute 9 *G.* 1. *c.* 9. § 3. to be discharged from serving the office of sheriff of *Norwich*, does not exempt the person paying it for more than a year, unless the corporation agree that he shall be discharged for a longer time. *R.* v. *J. Woodrow*, 2 T. R. 731

III. *Fees.*

1. If it appear by the sheriff's return of a writ of execution that greater fees have been taken for the levy than are allowed by stat. 29 *Eliz.* *c.* 4., the sheriff is liable to an action on the statute for treble damages at the suit of the party grieved. *Woodgate* v. *Knatchbull*. 2 T. R. 148

2. Under that statute the sheriff cannot take any other charge but that for the poundage. 2 T. R. 148

3. An action brought on stat. 29 *Eliz.* *c.* 4. for fees, must be brought by the sheriff and not by the bailiff. 2 T. R. 155—8

4. If a sheriff levy under a *fi. fa.* he is entitled to poundage, though the parties compromise before he sell any of the defendant's goods. *Alchin* v. *Wells*. 5 T. R. 470

5. And if after such compromise either party rule the sheriff to return the writ, the court will discharge that rule with costs, to be paid by the party obtaining it. 5 T. R. 470

6. The Court (of K. B.) directed the sheriff to refund his poundage which he had retained out of money levied upon an attachment for non-payment of money; there being no practice to warrant it; and referred him to his action, if he were supposed to have a right to it under the stat. 23 *H.* 6. *c.* 9. *R.* v. *Palmer*. 2 E. R. 411

7. In an action on 32 *G.* 2. *c.* 28. against a sheriff's officer, for taking a larger fee upon an arrest than is allowed by law, the plaintiff must prove the sum allowed by law, the stat. 23 *H.* 6. *c.* 9. not being the rule; and the court will not set aside a nonsuit grounded on the want of such evidence, in order to enable the plaintiff to recover the excess under the money counts, since he might have obtained redress by a summary application. *Martin* v. *Slade*. 2 N. R. 59

IV. *Return of Writs, &c.*

1. All writs must be returned by the sheriff on the day on which the rule for returning the same expires, and in default thereof the plaintiff is at liberty to move for an attachment on the next day. *Reg. Gen. M.* 32 *G.* 3, 4 T. R. 496

2. The Court upon the application of the sheriff enlarged the time for his making a return to the writ of *fi. fa.* upon a suggestion of a reasonable doubt whether the goods seized under the writ were not covered by an extent afterwards issued at the suit of the crown for malt duties under the stat. 28 *G.* 3. *c.* 37. § 21. for the purpose of inducing the plaintiff to go into the

Court of Exchequer and there contest the question of right with the crown.
Wells v. *Pickman*. 7 T. R. 174

3. The sheriff having been served in proper time with a rule to return the writ of *test. fi. fa.* which expired on the last day of term, is attachable at the rising of the court on that day if no return be made before. And the rule for the attachment is regular, though he make his return on a subsequent day in vacation, before he was actually served with the rule; and though immediately after such service he tendered the sum levied, deducting his poundage.
R. v. *Surrey Sheriff*. 11 E. R 591

4. The Court of C. P. refused to grant an attachment against the sheriff for returning to a writ of *venditioni exponas*, that part of the goods levied, remained in his hands for want of purchasers. *Leander* v. *Davis*. 1 B. & P. 359

5. The same sheriff, by whom any writ directed to him is executed while in office, ought to make his return to the same, and hand over such writ and return to the new sheriff who comes into office before the return-day; and such new sheriff will return the writ with the old sheriff's return thereon. And if the old sheriff, after arresting the defendant, suffer him to escape, and go out of office before the return day, he alone is answerable for the escape.
R. v. *Middlesex Sheriff*. 4 E. R. 604

6. Yet if the new sheriff, by mistake return *cepi corpus* to a writ directed to the old sheriff, after the latter, who arrested the defendant upon it, had permitted an escape, and an attachment afterwards issue against the old sheriff who was ruled to bring in the body, the irregularity may be waived by not moving in reasonable time to set aside the attachment. *ib.*

7. If the plaintiff has incurred the costs of instructing counsel to move for an attachment against the sheriff, before the defendant gives notice of his surrender, though he surrenders before the attachment is actually obtained, the court will order the costs of those instructions to be paid by the defendant upon setting aside the attachment.
R. v. *Middlesex Sheriff*. 1 W. P. T. 56

SHIP.

I. *Freight and Charter-Party.*

1. The mortgagee of a ship cannot maintain an action for freight against a third person before he takes possession. *Chinnery* v. *Blackbourne*, *B. R. E.* 24 G. 3. 1 H. B. 117, *n.*

2. A ship bound for *London*, after taking in her cargo, but before breaking ground, was cut out of her port of lading in *Jamaica* by a *French* privateer; but he afterwards re-captured and carried into another port in the same island, where the cargo was sold by order of the Court of Admiralty, for the benefit of the freighters: held, that the owners of the ship were not entitled to any part of the freight, though by the usage of the trade, the ship was freighted at their expense.
Curling v. *Long*. 1 B. & P. 634

3. If *A.* let his ship to *B.* for a voyage, engaging to keep it in repair during the whole time, for which he is to receive freight on the return of the ship; and, for the safety of the ship, it becomes necessary during the voyage to put into a port to refit; the expense of refitting must be born entirely by *A.*; and *B.* is not liable to contribute to it in proportion to his interest in the cargo, as for a general average.
Jackson v. *Charnock*. 8 T. R. 509

4. The plaintiff contracted to carry the defendant, his family, and luggage from *Demerary* to *Flushing*; and in the course of the voyage, within four days' sail of *Flushing*, the ship was captured by an *English* ship of war, and brought into *England*, and the ship and cargo libelled for prize in the Court of Admiralty, and the cargo condemned, and proceedings still pending against the ship; but the defendant, and his family, were liberated, and their luggage in fact restored to their possession. Held that, however, the question might be as to the plaintiff's right to recover passage-money upon an implied *assumpsit*, *pro ratâ itineris*, if the ship were restored, yet pending the proceedings against the ship as prize in the Admiralty Court, no such action could be maintained; for *non constat*, but that the ship might be condemned, and the freight decreed to the captors.
Mulloy v. *Backer*. 5 E. R. 316

5. *A.* and *B.*, merchants abroad, ship tobacco for *Liverpool*, consigned to *A.*

himself there, to whose order the bills of lading are made: one of these bills is sent inclosed in a letter from the shippers to *C.* at *Liverpool*, advising him of such consignment to *A.*, and that *A.* intended to proceed to *Liverpool*, but in case he should not arrive in time desiring *C.* to do the best for them. The tobacco having arrived in a damaged state before *A.*. is required to be landed, and is deposited in the King's warehouse pursuant to the statute; and afterwards *C.* acting as agent for *A.* within the knowledge of the captain, makes an entry of it in his own name in the custom-house, to avoid seizure: held, that this was not such an acceptance of the cargo by *C.* as would make him liable to the captain for the freight.

Ward v. *Felton.* 1 E. R. 507

6. Where a ship was let to freight by charter-party from the plaintiff to the defendant, a clause in the deed—"and it is hereby *covenanted and* "*agreed by and between* the said par-"ties *that* 40 *days shall be allowed* "for unloading and loading again, "&c." was held to raise an implied covenant on the part of the freighter not to detain the ship for loading and unloading, &c. beyond the 40 days: and if he detain her for any longer time, the owner's remedy is upon that covenant, and not in assumpsit, as upon an implied new contract.

Randall v. *Lynch.* 12 E. R. 179

7. Under an agreement in the nature of a charter-party, whereby the plaintiff let his ship on freight to the defendants on a voyage from *Shields* to *Lisbon*, with convoy, *the freight to be paid on right delivery of the cargo*, the ship having sailed from *Shields* with her cargo, and joined convoy at *Portsmouth;* and after being detained near a month off *Lymington*, her sailing orders being recalled by the convoy, in consequence of the occupation of *Portugal* by the enemy; and the defendants having refused to accept the cargo at *Portsmouth*, to which the ship returned, it was unloaded by the plaintiff, after notice to the defendant, and then was sold by consent of both parties, without prejudice; held that the plaintiff could not recover freight *pro ratâ*, or demurrage. *Liddard* v. *Lopes.* 10 E. R. 526

8. The plaintiffs having contracted, by charter-party sealed, to let a ship, then in the *Thames*, to freight to the defendants for eight months, *to commence from the day of her sailing from Gravesend* on the voyage then stated; and having covenanted that she should sail from the *Thames* to any *British* port in the *English* channel, there to load such goods as the freighters should tender, and sail to the *West Indies*, and bring back a return cargo to *London;* afterwards agreed by *parol* with the defendants, that the ship, instead of loading at some port in the Channel, should load *in the Thames*, and that the freight should *commence from her entry outwards at the custom-house:* held that this subsequent parol contract was distinct from, and not inconsistent with, the contract by deed, being anterior to it in point of time and execution, and might therefore be enforced by action of assumpsit.

White v. *Parkin.* 12 E. R. 578

9. Where the master of a vessel covenanted with the freighter *(inter alia)* that the vessel should proceed with the *first* convoy from *England* for *Spain* and *Portugal*, or either, *as he should be directed by the freighter or his agents;* and there make *a right and true delivery of the cargo*, agreeably to the bills of lading signed for the same; and so take in a home cargo, and return and make *a right and true delivery* thereof at *London*, &c. *In consideration whereof, and of every thing above mentioned*, the freighter covenanted *(inter alia)* to load the vessel out and home, and pay certain freight per ton per month, part before, and the remainder *on the right and true delivery* of the homeward cargo to *London:* held,

1st. That the freighter having first ordered the master to proceed to *Lisbon*, in consequence of which the master had taken in goods, and *signed bills of lading* for that port, could not afterwards countermand that order, and order him to proceed to *Gibraltar*, without first recalling the bills of lading, or at least tendering sufficient indemnity to the master against the consequence of his liability thereon.

2d. But supposing the freighter had such a power, yet his supercargo and agent, who was on board the vessel, had the like authority in the absence of his principal, even before the vessel sailed from this country, to alter again the destination to *Lisbon*.

3d. That the master having proceeded with the outward cargo to *Lisbon* under the first order, and brought home a return cargo, and delivered the same to the freighter at *London*, was entitled to his freight for that voyage; though he had not sailed with the *first* convoy: the sailing with the *first* convoy not being a *condition precedent* to his recovering freight for the voyage actually performed under the first order, but a distinct covenant, for the breach of which he was liable in damages.

4th. And he was entitled to recover such freight as upon *a right and true delivery of the cargo agreeably to the bills of lading*, upon proof of having delivered the entire number of chests, &c. for which bills of lading had been signed; though it appeared that the contents of the chests of fruit were damaged by the negligence of the master and crew on board, in not ventilating them sufficiently: the party injured having his counter-remedy by action for such negligence.

Davidson v. *Gwynne*. 12 E. R. 381

10. If a ship freighted to *H.* under a charter-party, is prevented by restraint of princes from arriving, and the consignees direct the master to deliver the cargo at *G.*, and accept it there, he may maintain *assumpsit* upon an implied contract to pay freight *pro ratá itineris*.

Christy v. *Row*. 1 W. P. T. 300

11. And if the master be prevented by the default of the consignees or restraint of princes from delivering the whole cargo there, he shall be entitled to freight *pro ratá* for the part delivered. 1 W. P. T. 300

12. If a ship be freighted on a single voyage outwards, and be prevented from delivering her cargo, *semble* that she shall be entitled to receive from the owner of the cargo freight for bringing it back. 1 W. P. T. 300

13. And *semble*, that the master would not be entitled, upon losing the delivery, to cast away the residue of the cargo. 1 W. P. T. 300

14. If the master sign a bill of lading, expressing, that upon the delivery of the cargo freight is to be paid by the consignees, he does not thereby renounce his claim for freight against the consignor. 1 W. P. T. 300

15. *Semble*, that the master's right to exact payment of any part of the freight from the consignee, does not arise till the delivery is completed, or determined. 1 W. P. T. 300

16. Upon an agreement to pay certain pilotage and port-charges for an entire voyage, though a part only of the cargo is delivered, there shall be no apportionment of the pilotage and port-charges, but the whole shall be paid. *Christy* v. *Row*. 1 W. P. T. 300

17. A covenant in a charter-party of affreightment that the owner shall at his expense *forthwith* make the ship tight and strong, &c. for a voyage for twelve months, &c. and *keep* her so, is not a condition precedent to the recovery of freight, after the freighter had taken the ship into his service, and used her for a certain period: but if the freighter be afterwards delayed or injured by the necessity of repairing her, he has his remedy in damages. But if the owner's neglect to repair in the first instance had precluded the freighter from making *any* use of the vessel, that would have gone to the whole consideration, and might have been insisted on as a bar to the action.

Havelock v. *Geddes*. 10 E. R. 555

18. A ship having been let to freight for twelve months, and for such longer period as the freighters should detain her, for which certain proportions of the freight were to be paid at the end of 2, 6, 10, and 14 months, &c.; it is no answer to a breach for non-payment of six months' freight, due at the end of the 10 months, that the owner had covenanted to *keep* the vessel *in repair* during the time she was freighted, and that she was not in repair *when* the freighter *shipped goods* on board her during the 12 months, which made it necessary for him to unload and repair her, whereby she was unserviceable for part of the six months; and that he had paid the freight for all the time she was serviceable; and that she was not in his service for 10 months in the whole: for *non constat*, but that after she had been used by the freighter, she wanted repair, without any default of the owner; or that he was guilty of any delay in making the repairs; and the freight would still run on during the time of repair.

Havelock v. *Geddes*. 10 E. R. 555

19. The freight being reserved at so much *per month*, was earned at the end of each month, although the sti-

pulated time of payment were from 4 months to 4 months (beginning at the end of 2 months) and the ship were lost before the end of 14 months.

10 E. R. 555

20. An allowance for extra men being covenanted to be paid by the freighter, the residue of which (after part payment) was not to be paid *till the ship's discharge, or return from her voyage*, and the ship having sailed on a voyage to *St. Domingo* where she arrived, but was burnt before her return: held that such loss was a discharge of her from the freighter's employment, as if by the act of the freighter on which such extra-allowance became payable. 10 E. R. 555

21. By a charter-party of affreightment the owner of the ship covenanted to take on board at *London* the freighter's goods, and proceed therewith to *Monte Video*, and there to deliver them to the freighter's agent, and receive from him another cargo, and (wind and weather permitting) proceed therewith to his port of discharge in *G. B.*, and there deliver the same to the freighter, and end the said voyage: In consideration whereof the freighter covenanted to pay 670*l.* per month, *for freight, during the said intended voyage* to Monte Video, *and back to her port of discharge;* such freight to commence from the day the ship should be ready to receive her outward-bound cargo, and to end when she should have finally discharged the whole; and also to pay two-thirds of all pilotage and port-charges during the said voyage; *such freight, pilotage, and port charges to be paid on the arrival and discharge of the ship at her destined port in* G. B.—

In covenant by the owner for an alleged breach in non-payment of freight, pilotage, and port-charges, it is not enough to shew that the ship, after having taken in a cargo in *G. B.*, and proceeded part way on the voyage, but before her arrival at *Monte Video*, was, without the default of the owner or crew, wrongfully seized and brought back to *London*, and there detained for some time, till she was restored to the owner; in consequence of which she required repairs, which were done with all necessary dispatch, and that the owner was then *ready and willing* to cause the ship to prosecute and complete her voyage, and gave notice thereof to the freighter, and *tendered* him the ship properly fitted, &c. for the purpose, and *requested* him to give the necessary instructions in that behalf, and *offered* to observe the same, &c. but that the *freighter would not give* any such instructions, &c. *nor permit* the ship to prosecute or complete the voyage; but *refused to do so, and wholly renounced the charter-party, and the further prosecution of the voyage, and wholly discharged the owner from further prosecuting or completing the voyage, and and dispensed therewith.*

For the freight (*quâ freight*) pilotage, and port-charges, are only covenanted to be paid by the freighter *on the arrival and discharge of the ship at her destined port in* G. B., and therefore such arrival and discharge which must be understood after the stipulated voyage performed), are conditions precedent to the owner's right to *freight*, &c. And it is not enough to shew that the owner did all in his power towards earning the freight, &c. by the tender of his ship to complete the voyage, and his offer to obey the freighter's instructions; because, though the owner had actually done, as far as lay in his power, all that he offered to do, and which the freighter discharged him from doing, it would only have amounted at most to an *endeavour* on his part to complete the voyage and earn the freight, &c. but such completion was still liable to be defeated by the act of God, or the accidents of the voyage: and the performance of the condition which was to entitle the owner to freight, &c. would still have been *contingent*, although such his offers had been accepted by the freighter. Therefore this is not like the cases where a party tendering to do that which he has undertaken, and which he has the *immediate* power of doing at the time, in order to entitle himself to a concurrent duty from another, is by a refusal of that other to accept such tender, dispensed with the necessity of averring performance of it, in an action for a breach in not performing the subsequent or concurrent duty.

Smith v. *Wilson*, 8 E. R. 437

22. A covenant in a charter-party of affreightment, to pay freight to the owner for the hire of the vessel, is not transferred to the vendee by a bill of sale of the ship, made during the voyage; and such owner afterwards becoming bankrupt, his assignees, and not the vendee of the ship, have the legal right to receive the freight and demurrage due from the freighter upon the charter-party.

Splidt v. *Bowles.* 10 E. R. 279

23. Where the master and freighter of a vessel of 400 tons mutually agreed in writing, that the ship, being every way fitted for the voyage, should with all convenient speed proceed to *St. Petersburgh*, and there load from the freighter's factors a *complete* cargo of hemp and iron, and proceed therewith to *London*, and deliver the same on being paid freight for hemp 5*l.* per ton, for iron 5*s.* a ton, &c.: one half to be paid on right delivery, the other at 3 months: held that the delivery of a *complete* cargo was not a condition precedent; but that the master might recover freight for a short cargo at the stipulated rates per ton; the freighter having his remedy in damages for such short delivery.

Ritchie v. *Atkinson.* 10 E. R. 295

24. Where in a charter-party freight was to be paid at so much per ton, *on a right and true delivery of the homeward-bound cargo*, from *Honduras Bay* to *London*, and the ship and cargo, after capture and recapture, having been wrecked at *St. Kitts*, into which she was carried by the recaptors, a sale of the cargo was directed by the Vice-Admiralty Court there, on the application of the master, acting *bonâ fide* for the benefit of all concerned, but without orders from any; and the proceeds of the sale were remitted to the ship owners: held that the freighter might recover such proceeds in assumpsit for money had and received, without allowing freight *pro ratâ itineris.* For such form of action, for the proceeds of an illegal sale of goods, is only a waver of any claim for *damages* for the tortious act; taking the actual proceeds of the sale as the value of the goods (subject to the legal consequences of considering the demand as a debt; which admits of a set-off, &c.) but does not recognize the right of the vendor so to convert the goods. And here the act of conversion (for such it must be taken to be) being made by the master, who is the general agent of the ship-owners, (and not, as in *Baillie* v. *Modigliani*, by the act of a court of competent jurisdiction), was unlawful, and discharged the claim of the ship-owners for freight *pro ratâ itineris.*

Hunter v. *Prinsep.* 10 E. R. 378

25. But the plaintiff could not recover against the ship-owners upon special counts framed upon the bills of lading signed by the master; as well because they contained exceptions of the very perils by which the loss happened; as because the defendants, having expressly contracted with the plaintiff under seal, could not be charged in respect of the same subject-matter by a contract not under seal, and signed by their master only, and not by themselves. 10 E. R. 378

26. The clauses in the *East India* Company's charter-parties, whereby the Company agree to allow 200*l.* per month for provisions while the ship remained in *India* or *China*, to be computed from her delivery of the Company's dispatches (if any) at the ship's "*first consigned port*, until she should be dispatched from her *last port* in *India* or *China* to return to *Europe*," is to be understood of her *last consigned port*; and will not include the time which elapsed after her departure from *Canton* (which was her last consigned port according to her sailing instructions), on her return to *Europe*, from which course she was driven by stress of weather, and forced to put into *Bombay* for repairs, before she was again dispatched for *Europe*. But after the ship was ready to sail again from *Bombay*, the Company having detained her two months longer for convoy before they again dispatched her for *Europe*, they paid the 200*l.* a-month for that period. And the 14*l.* covenanted to be paid by the Company to the ship owner *in England*, for each passenger ordered on board the ship in *India* by the Company's agents, is payable, notwithstanding the loss of the ship before her arrival in the *Thames.*

Moffat v. *E. Ind. Comp.* 10 E. R. 468

27. Under the common printed form of the *East India* Company's charter-parties, the Company are warranted

in sending any chartered ship on a warlike expedition, in aid of government, under command of the King's officer placed on board; and such ship remains under the charter-party, though alterations are made to increase her number of guns, &c.

Dobree & al. v. *E. I. Com.* 13 E. R. 290

28. In assumpsit on a memorandum for a charter-party, describing the agreement of the defendant, a ship-owner, to proceed with all convenient speed to a foreign port, there lade a cargo, and therewith return home, and deliver the same under a *certain penalty* for non-performance: the Court of K. B. held that the plaintiff might recover damages beyond the amount of the penalty, on defendant's breach of contract, in not permitting the ship to proceed on her outward-bound voyage. *Harrison* v. *Wright.* 13 E. R. 343

II. *Liability of Owners and Masters.*

1. *Quære.* Whether a mortgagee of a ship out of possession be not liable to repairs. *Westerdell* v. *Dale.* 7 T. R. 306

2. Where the legal title to a ship remained for a month after the sale in the vendors, upon the face of the register, by reason of the vendee having omitted for so long to deliver a copy of the indorsement of the transfer on the original certificate of registry to the proper officer authorized to make registry, &c. pursuant to the stat. 34 *G.* 3. *c.* 68. § 15.; yet the vendors are not liable during that interval for repairs ordered by the captain, under the direction of the vendee (who for this purpose must be considered as a stranger to the legal owners), and consequently had no authority express or implied to bind them.

Young v. *Brander, M.* 8 E. R. 10

3. The master and the freighter of a vessel of 400 tons, having mutually agreed in writing, that the ship, being fitted for the voyage, should proceed to *St. Petersburgh*, and there load from the freighter's factor a complete cargo of hemp and iron, and proceed therewith to *London*, and deliver the same, on being paid freight, &c.: held that the master, after the taking in at *St. Petersburgh*, about half a cargo, having sailed away upon a general rumour of a hostile embargo being laid on British ships by the Russian government, was liable in damages to the freighter for the short delivery of the cargo; though the jury found that he acted *bonâ fide*, and under a reasonable and well-grounded apprehension at the time; and a hostile seizure under an embargo was in fact made six weeks afterwards.

Atkinson v. *Ritchie.* 10 E. R. 530

4. The registered owner of a ship having chartered her to the then captain at a rent for a certain number of voyages, is not liable for stores furnished to the ship by order of the captain during the charter-party.

Frazer v. *Marsh.* 13 E. R. 238

III. *Seamen's Articles and Wages.*

1. Foreign seamen at a foreign port enter into articles with the master, who is also a foreigner, for a voyage on board a foreign ship, and thereby agree, among other things, not to institute any suit against the master in foreign countries, or cite him before any judge or magistrate, but *that they will abide by the maritime code of their own country, and the adjudication of their own courts.* Having made this agreement in their own country, they cannot maintain an action in *England* against the master for wages; though the ship and cargo be confiscated in an *English* port, and the voyage thereby ended.

Gienar v. *Meyer.* 2 H. B. 603

2. A seaman belonging to a merchant ship, which is articled for a certain voyage, is prevented from performing the whole voyage, by being disabled by an accident happening in the course of his duty; he is entitled to wages for the whole voyage.

Chandler v. *Grieves, H.* 32 *G.* 3. (C. P.) 2 H. B. 606, *n.*

3. If a sailor, hired for a voyage, take a promissory note from his employer for a certain sum, provided he proceed, continue, and do his duty on board for the voyage; and before the ship's arrival he die, no wages can be claimed, either on the contract, or on a *quantum meruit.*

Cutter v. *Powell.* 6 T. R. 320

4. A seaman having contracted to go a voyage from *A.* to *B.* and back again, with a stipulation that he should not be entitled to his wages till the end of the voyage, cannot maintain a general *indebitatus assumpsit* to recover his wages *pro rata* as far as *B.*; though

he were there wrongfully dismissed by the defendant, the captain; but his remedy is either for the breach of the special contract, or for such *tortious* act of the captain's, whereby he was prevented from earning his wages.

Hulle v. *Heightman*. 2 E. R. 145
(And see DEED II.)

5. The 37 *G.* 3. *c.* 73. § 3. having prohibited more than double monthly wages, being given to seamen coming from the *West Indies*, unless the captain be specially licensed to give a greater rate by the chief officer of the port; a general licence by such chief officer to a captain "to procure men on such terms as he can," is void.

Rogers v. *Lacy*. 2 B. & P. 57

6. A sailor, in addition to the wages contained in the ship's articles, sued for the average price of a negro slave, for which he had agreed with the captain, though no mention of such perquisite was made in the articles: held, that the contract for the average price of a negro slave was void: such additional perquisite being in fact wages, and therefore only to be recovered where included in the articles according to 2 *G.* 2. *c.* 36.

White v. *Wilson*. 2 B. & P. 116
(And see INSURANCE IX.)

7. A seaman who quits his ship, after her arrival in port, but before she is moored, does not thereby subject himself to the forfeiture of the whole of his wages under the 2 *G.* 2. *c.* 36. § 3.

Frontine v. *Frost*. 3 B. & P. 302

8. To entitle the master to deduct a month's wages for the benefit of *Greenwich* Hospital under the the 2 *G.* 2. *c.* 36. § 6. and 9. it is incumbent on him to shew that the seaman quitted his ship without leave in writing. *ib.*

9. And such a deduction cannot be set off by the master in an action for wages by the seaman, unless the master has previously debited himself to *Greenwich* Hospital for the amount in a book kept according to the direction of the statute. *ib.*

10. If a sailor executes the articles prescribed by 37 *G.* 3. *c.* 73. and serve accordingly, and during the voyage part of the cargo be plundered, but by whom cannot be ascertained, he does not, in consequence of such plunderage, forfeit his wages.

Thompson v. *Collins*. N. R. 347

11. And *semb.* That in such case he is not even liable to a proportionable deduction from his wages, in common with the other sailors, on account of such plunderage. *ib.*

12. *Assumpsit* lies to recover wages by the master of a vessel against his owners which accrued during the detention of a vessel under a hostile embargo in a foreign port, when the crew were made prisoners, but were finally released, together with the vessel, and afterwards completed the voyage; it appearing that freight was received.

Pratt v. *Cuff*, Sittings at *Guildhall* after *H.* term 1798, cor. Lord *Kenyon* C. J. cited in *Thompson* v. *Rowcroft*. 4 E. R. 43

13. A foreign prince, under pretence of precaution against a supposed act of aggression, of our goverment, made a hostile seizure of *British* ships in his ports and imprisoned our seamen on shore; and after six months they were released, and resumed and concluded their voyage, and the owners received their freight: held that such seizure, however hostile in the manner, so far partook of the nature of an *embargo* in its result, and not of a capture, that it did not put an end to the contract of a mariner for wages, even during the time of such detention and imprisonment. But even considering it as a temporary capture, yet, like the case of a capture and recapture, the mariner was still entitled to his wages; for a mariner's title to wages depends on the ship's earning her freight on the voyage, and the performance of his stipulated duty; and here freight for the voyage was ultimately earned: and the mariner was guilty of no breach of duty; for his stipulation *and to be on shore under any pretence, without leave, before the voyage was ended*, must be understood of his being on shore *by the party's own unauthorized act*. And even if such imprisonment on shore could be so considered, yet the master's having afterwards received him again on board without objection, amounting to a dispensation of the service in the interval, and entitled him to wages, according to his original contract. *Beale* v. *Thompson*, (in error from C. P.) 4 E. R. 546

Note. The Judges in C. P. were equally divided upon this case.

See 3 B. & P. 405- 434

S. P. in the case of foreign seamen, *Johnson* v. *Broderick*. 4 E. R. 566
(And see AGREEMENT III.)

14. Where the captain of a ship has accounted upon oath to the collector of the port for a sum of money as the wages due to a deceased seaman, and paid the same to *Greenwich* hospital under 37 *G.* 3. *c.* 73., the representatives of such seaman may still sue the captain for any wages due beyond the sum so paid.

Armstrong v. *Smith.* N. R. 299

15. Seamen enter into articles to serve for monthly wages on board a ship "bound for the ports of *Madeira*, any of the *West India* islands, and *Jamaica*, and to return to *London*;" and it is agreed that they shall not *demand* or *be entitled to their wages, or any part thereof*, until the arrival of the ship at the port of discharge, &c. (meaning *London*); held that though the ship earned freight upon the delivery of an outward bound cargo at *Madeira*, and of another cargo taken in at *Madeira*, and delivery in the *West Indies*; yet that being lost in her passage home in a storm, the seamen could not recover wages *pro rata* upon the outward voyage, by reason of the express terms of the stipulation respecting wages. *Appleby* v. *Dods.* 8 E. R. 300

16. If there be a clause in a ship's articles that the seamen may leave at the end of three months, if the ship is in port, or in perfect safety, of which the captain is to be the sole judge, and the ship to be in port and safety after three months, the seamen may leave the ship without the permission of the captain.

Neave v. *Pratt.* 2 N. R. 408

IV. *Registry Sale and Transfer of Ships.*

1. A delivery of the grand bill of sale of a ship at sea is equivalent to a delivery of the ship itself.

Atkinson v. *Maling.* 2 T. R. 462

2. Where a ship was mortgaged at sea, with a proviso that the mortgagor, should continue in possession till failure of payment of the mortgage money on demand, but the grand bill of sale was delivered, and the mortgagor became bankrupt before the arrival of the ship, and the mortgagee took possession on her arrival; he may maintain trover against the assignees who took the ship from him, notwithstanding he made no demand either on the bankrupt or his assignees. 2 T. R. 462

3. Notwithstanding the statute of 26 *G.* 3. *c.* 60. § 17. enacts that a bill of sale of a ship shall be absolutely void, unless the certificate of the registry be truly and accurately inserted therein, (see *Rolleston* v. *Hibbert*, 3 T. R. 406) the Court of K. B. held, that a mere clerical mistake will not vitiate it.

Rolleston v. *Smith.* 4 T. R. 161

4. And the Court of C. P. held that the indorsements on such certificate of registry need not be recited in the deed of assignment of a ship. [See now 34 *G.* 3. *c.* 68. § 15.]

Capadose v. *Codnor.* 1 B. & P. 483

5. Though a bill of sale for transferring the property in a ship by way of mortgage may be void as such, for want of reciting the certificate of registry therein, as required by stat. 26 *Geo.* 3. *c.* 60. § 17. yet the mortgagor may be sued upon his personal covenant contained in the same instrument for the repayment of the money lent.

Kerrison v. *Cole.* 8 E. R. 231

6. *A.* and *B.* being joint owners of a ship, *A.* conveyed his moiety to *B.*; but in the bill of sale the certificate of registr was not truly recited: *B.*; took possession, and afterwards mortgaged the whole ship to *A.*, who did not take possession; then *B.* ordered *C.* to repair the ship: afterwards *B.* conveyed one part of the ship to *A.*, and the other to *D.*: held that the first bill of sale was an absolute nullity under the statute 26 *G.* 3. *c.* 60. § 17., and that *A.* was liable to *C.* for the repairs of the ship in an action for work and labour brought by *C.*; *A.* not having pleaded in abatement that *B.* ought also to have been sued.

Westerdell v. *Dale.* 7 T. R. 306

7. The stat. 34 *G.* 3. *c.* 68. § 15. reciting that by the laws in force, upon *any* alteration of property in any vessel *in the same port* to which she belongs, an indorsement on the certificate of registry is required to be made; enacts that such indorsement shall be made in the form therein expressed, and shall be signed by the vendor. &c. and a copy of such indorsement shall be delivered to the registering officer; or otherwise the sale shall be utterly null and void: and such officer is required to make entries thereof on the affidavit on which the original certificate was obtained, and in the book of registry,

and to give notice thereof to the commissioners of customs. Then § 16. provides that if any vessel shall be at sea, *or absent from the port to which she belongs*, when such alteration in the property shall be made: *so that* an indorsement on the certificate cannot be made; (assuming that the certificate is always with the ship); then it substitutes a bill of sale to be made in lieu of the indorsement on the certificate; requiring the same delivery of a copy, and the same entries and notice thereof, as was required for the indorsement of the certificate by the prior section, but that within ten days after the vessel's return to her port, the indorsement on the certificate, &c. shall be made; as before required. Held that the provisions of the two sections comprehend *every* transfer of property in a ship; and that a bill of sale executed by a sole owner of a vessel belonging to the port of *Sunderland* to a vendee residing in *London*, at a time when the vessel was *in the port of* London, was void, for want of complying with the requisites of one or other of those sections; neither of them having been complied with: and that it was not sufficient for the vendee to have complied with the requisites of the statute 7 & 8 *W.* 3. *c.* 22. § 21., which requires a registry *de novo* upon *any transfer of property* to *another* port, and that the former certificate shall be delivered up to be cancelled.

Hayton & al. (Assignees, &c.) v. *Jackson & al.* 8 E.R. 511

8. Upon the transfer of a share in a vessel, it is not necessary that the indorsement upon the certificate of registration should express the share to be *all* the vendor's interest. The omission of the officer at the out-port to transmit a copy of the instrument to the custom-house in *London*, does not invalidate the transfer. *Underwood* v. *Miller & Fatkin.* 1 W. P. T. 387

9. Under the ship register acts (26 *G.* 3. *c.* 60. and 34 *G.* 3. *c.* 68.) a bill of sale transferring the property to a trustee, in trust for the underwriters not named, is at most only void (if at all) as to the objects of the trust, but sufficient to convey the legal title to the trustees. And such bill of sale of a ship at sea is valid, notwithstanding the omission of the officer at the out-port to which the ship belonged, to indorse the entry of the transfer on the oath on which the original certificate of registry was obtained, and to make a memorandum thereof in the book of registry, and to give notice of the same to the commissioners in *London*, as required by section 16 of the 34 *G.* 3. *c.* 68; such acts to be done by the public officer being only directory. But the delivery of a copy of the bill of sale of a ship at sea for the purpose of making such entry and memorandum and giving such notice, being an act required to be done by the party himself to whom the transfer is made, for want of which the statute avoids the sale, must be complied with in order to convey the property: and therefore the purchaser under such circumstances having omitted to do so, cannot make a title to the ship *per saltum*, by getting her registered *de novo*, in another port where he resided at the time: for whatever may amount to a transfer of a ship to another port, within the meaning of the statutes, at all events such transfer cannot be made by one who has no interest in the ship.

Heath v. *Hubbard.* 4 E. R. 110

9. The ship register acts do not apply to a transfer of property by operation of law, such as from the commissioners to the assignees of a bankrupt.

Bloxam & al. Assignees v. *Hubbard.* 5 E. R. 407

10. Under the ship register acts 7 & 8 *W.* 3. *c.* 22. § 21., and 26 *G.* 3 *c.* 60. § 3, 4, 5, 46., and 34 *G.* 3. *c.* 68. § 15, 16., in order to make title to a ship sold at sea, whether in whole or in part, such sale must be acknowledged by indorsement of the certificate of registry in the manner therein described, and a copy of such indorsement be delivered by the vendee to the persons authorized to make registry, (which officers are *directed* to make an entry thereof, to be indorsed on the oath or affidavit upon which the original certificate of registry was obtained, and to make a memorandum in the book of registers, and to give notice thereof to the commissioners of the customs); and it is not sufficient for the vendee to register such ship *de novo*, in another port, where he resided, though he removed the ship there, and she never returned to her original port after the sale.

5 E. R. 407

12. An indorsement of a transfer of a ship in the same port made upon the certificate of the registry, and bearing date at the time of the transfer, but not signed by the vendor till three years after such certificate had been delivered up and cancelled, and had remained dormant during all the intermediate time: held not to conver a title to the ship under the register act 34 *G.* 3. *c.* 68. § 15. and other acts; such certificate having been so cancelled and delivered up upon occasion of the vendee's obtaining a register *de novo*, (issued without authority), which recited the cancellation of the former certificate. For the object of the register acts in requiring such indorsement, is in order to notify the change of property to the public; and therefore it is required to be made on an existing acknowledged certificate, in use at the time; and consequently no title passed to the assignees of the vendee, who had become bankrupt between the time of the original transfer to him, and the signing of such indorsement by the vendor; the vendee having also, before his bankruptcy, conveyed away the ship to third persons for a valuable consideration, who were in possession of it. But *quere*, whether any title could be made under such register *de novo*, issued without authority, upon a transfer of the ship in the same port? And therefore the vendees of the bankrupt only held their possession on such defect of title in the assignees of the bankrupt. *Moss & al. Assignees* v. *Mills.* 6 E. R. 141

13. A foreign-built ship, *British* owned, is not required to be registered.
Long v. *Duff.* 2 B. & P. 209

14. Such a ship may therefore sail without convoy, being within the exception of the convoy act 38 *G.* 3. *c.* 76. § 6. *ib.*

15. *A.* the owner of a ship, executes an *absolute* bill of sale of it to *B.*, and by another deed of the same date, assigns other property to *B.*, which deed of assignment (reciting that the bill of sale was for the better *securing a sum of money* lent by *B.* to *A.*, and also reciting a bond and warrant of attorney *to secure the same sum*), declares that those "several deeds and instruments "were made to enable *B.* by sale of "*all the things* comprised in them, to "raise the sum lent, without the con-"currence of *A.*, *at any time* before "the money should be paid off;" but in this deed there is a covenant that upon repayment of the money, "*B.* "shall *re-convey* to *A.*, but so as not "to prevent *B.* from *selling*, &c. *at* "*any time before the full payment*, &c." under these conveyances, *B.* is not absolute owner of the ship, but only mortgagee; and therefore, *is not liable for necessaries provided for the ship before he takes possession.*
Jackson v. *Vernon.* 1 H. B. 114

16. The Vice-Admiralty Courts abroad have no authority, upon the mere petition of the captain of a ship bound on a foreign voyage, to decree the sale of such ship, reported upon survey not to be sea-worthy, or repairable so as to carry the cargo to its place of destination but at an expense exceeding the value of the ship when repaired. Nor does it appear that the master has any original authority to *sell* the ship under such circumstances, and to put an end to the adventure by such discretionary act of his own, when he might in fact have repaired the ship and continued the voyage. But supposing he has such authority exercised *bonâ fide* in a case of necessity; still the vessel subsisting as such, and capable of being used for the purposes of navigation, and so used in fact after some repair on the spot, can only be conveyed by the captain in the form prescribed by the register acts; and the requisites of those acts not having been complied with, the sale in question was held to transfer no property to the vendee.
Reid v. *Darby.* 10 E. R. 143.

V. *Salvage.*

1. A ship being in danger and the captain and part of the crew having made their escape, a passenger at the request of the crew took the command and brought the ship safe into port. The merits of the passenger in saving the ship were acknowledged by the owner in a letter to one of the underwriters wherein he expressed his desire to make him a compensation; held that the passenger was entitled to sue the owner for the salvage.
Newman v, *Walters.* 3 B. & P. 612

2. The commander of a stranded vessel having by the recommendation of the pilot, who came to his assistance, sent to the defendant on shore, till then a stranger to him, to send all the help

which was necessary, which he accordingly did; and under his direction (but also under the inspection of custom-house officers attending) the goods were brought on shore and housed under the joint locks of himself and the collector of the customs, and he paid all the salvors; the court of K. B. held that this constituted him the agent of the owners, and took the case out of the statute 12 *Ann st.* 2. c. 18. § 2. for regulating the quantum of salvage by the award of three justices of peace; which statute only applies to cases where application is made by the owners, &c. to certain public officers named, and the salvage is made under their orders.

Baring v. *Day*. 8 E. R. 57

See now statutes 48 *G.* 3. *c.* 130. § 21. 49 *G.* 3. *c.* 122. § 32. extending to cases where officers of the customs do not interfere.

SIMONY.

1. *Qu.* Whether a bond of resignation with condition to reside, to resign for the patron's son to be presented, and to keep the premises on the living in repair, be not good in law?

Partridge v. *Whiston*. 4 T.R. 359

2. In an action for use and occupation by an incumbent against a tenant of the glebe lands, who has paid him rent, the defendant cannot give evidence of a simoniacal presentation of the plaintiff, in order to avoid his title.

Cooke v. *Loxley*. 5 T. R. 4

3. A chapel in the township of *P.* was endowed in 1428, by a deed executed by the then impropriator of the rectory, the then vicar, and the inhabitants of the township, and confirmed by the diocesan; whereby in consideration of a yearly payment to the vicar, it was provided that the curate of the chapel should receive all the tithes due to the vicar from the said inhabitants, and should be appointed by them: under which deed they continued to exercise the power of appointment and presentation. In 1797 an act passed for inclosing open lands in the township, in which it is stated, as a matter of doubt, whether the curate were entitled to the small tithes or to a *modus* in lieu of tithes, the decision of which is left untouched by the act. In 1801, upon a vacancy, the inhabitants appoint and present a curate, upon an agreement signed by him and the principal inhabitants, wherein they state that he is appointed to the curacy, &c. and *to the money payment of* 40*l.* 8*s.* 2*d. annually payable out of the lands and heriditaments in* P. in right of the said curacy, together with surplice fees and *all other profits, privileges, and appurtenances to the same belonging and of right payable:* that the inhabitants considering that sum not sufficient for the proper support of the curate, had *voluntarily* agreed with him to pay a further annual sum of 29*l.* 11*s.* 10*d.* with a *proviso* that it "shall not in any respect alter the money payment of 40*l.* 8*s.* 2*d. wherewith the said lands are and have been* TIME IMMEMORIAL *charged in right of the said church.*" The Court of K. B. held that this agreement, entered into for the purpose of restraining the then curate from asserting his claim to the small tithes by due course of law, and furnishing evidence against his successors, was *simoniacal*, and the presentation made thereon void. And the right of presentation having thereupon devolved upon the crown by stat. 31 *Eliz.* *c.* 6. § 5., whose presentee had been licensed by the ordinary, a mandamus to the ordinary to license another curate subsequently appointed and presented by the inhabitants, who had given notice of having withdrawn their former nomination and presentment, and cancelled the agreement, was denied; and the rule was discharged with costs.

R. v. *Oxford (Bp.)* 7 E. R. 600

SMUGGLING.

1. By stat. 24 *G.* 3. *c.* 47. and the excise laws, the forfeiture of a vessel attaches the moment an act of smuggling is done; so as to avoid mesne incumbrances or alienation between that time, and the time of condemnation. *Lockyer* v. *Offley*. 1 T. R. 260
2. But the crown is not entitled to the intermediate earnings of the vessel. *ib.*
3. Neither is the actual property of the vessel altered till after the seizure, though it may be before condemnation. *ib.*
4. Custom-house officers may seize for the forfeiture within three years after the act committed; and the attorney-general may file an information at any time whilst the ship is in being.

1 T. R. 261

5. An inhabitant of *Guernsey* cannot recover in the courts of this country the price of goods sold by him there, if he knew it to be the buyer's intention to smuggle the goods into *England*, and gave him assistance for that purpose, as in the mode of packing the goods. *Clugas* v. *Penaluna*. 4 T. R. 466
6. If goods, prohibited from being sold in this country by 11 & 12 *W.* 3. *c.* 10. are taken out of a warehouse and put on board a vessel as if for exportation, but in fact, with a view to be re-landed; they are liable to be seized, though before any actual attempt to reland them has been made.

Wilson v. *Saunders*. 1 B. & P. 267
7. A factor selling a parcel of prize manufactured tobacco, consigned to him from his correspondent at *Guernsey*, of which a regular entry was made on importation, but without having entered himself with the excise officer as *a dealer* in tobacco, nor having any licence as such, may yet maintain an action against the vendee for the value of the goods sold and delivered; and this, though the tobacco were sent to the defendant without a permit, at his desire; there being no fraud upon the revenue, but at most a breach of revenue regulations protected by penalties: even if such factor could, upon this single and accidental instance, be considered as *a dealer* in tobacco within the meaning of the stat. 29 *G.* 3. *c.* 68. § 70., which requires every person, who shall *deal* in tobacco, first to take out a licence under a penalty.

Johnson v. *Hudson*. 11 E. R. 180
8. A vessel hired by the admiralty and employed to cruize against smugglers, the master and crew of which were appointed by the owner, but which was placed under the superior command of a captain appointed by the Board, is forfeitable for an act of smuggling committed on board by such Admiralty captain as well as by the owner's master and crew; and the owner has his remedy over by action on the case against such Admiralty captain to recover damages for the loss of his ship by the condemnation, though that condemnation proceeded upon acts of smuggling stated to be by persons unknown, and though it appears in fact that the master and mate appointed by the owner were also concerned in acts of smuggling on board. *Blewitt* v. *Hill*. 13 E. R. 13

SOLDIERS.

1. A soldier in actual service may be committed to prison for want of sureties, under stat. 6 *G.* 2. *c.* 31. for being the father of a bastard child.

R. v. *Archer*, 2 T. R. 270

And *R.* v. *Bowen*. 5 T. R. 156
2. *Qu.* Whether the court will grant a *certiorari* to remove an order of session by which a soldier is continued in custody under such a charge?

5 T. R. 156
3. The clause in the mutiny act, § 63. which exempts soldiers from arrest in cases where the demand is under 20*l.*, is confined to civil actions.

2 T. R. 274; 5 T. R. 156
4. Whether ale-house keepers, who have no stables, are bound to receive *horses* as well as soldiers?

Qu. R. v. *Dimpsey*. 2 T. R. 96
5. The foot guards may be billetted all over the kingdom, as well as the other troops. *R.* v. *Calvert*. 7 T. R. 724
6. The *receiving pay* as a soldier, subjects the receiver to military jurisdiction under the mutiny act.

Grant v. *Sir C. Gould*. 2 H. B. 69
7. By the mutiny act the king may make articles of war, and constitute courts martial, with power to try and punish, as well in *Great Britain*, *&c.* as in *Gibraltar*, *&c.* By a subsequent clause no soldier shall, by such articles of war, be subjected to the punishment of death, or loss of limb, within *Great Britain*, *&c.* (omitting *Gibraltar*) for any crime not expressed to be so punishable by the act. Then by the articles of war, persons found guilty by a court-martial at *Gibraltar*, of theft, robbery, &c. *or of having used violence, or committed any offence against the persons or property* of others, "shall suffer death, or other punishment, *according to the nature and degree of the offence*, as by the sentence of such court-martial shall be awarded:" held that the court-martial have a discretionary power by such words, and are not restricted to pass such sentence on a delinquent as would be warranted by the law of *England*. But supposing they were, yet that a return to a *habeas corpus*, stating that upon a certain charge exhibited against the defendant before such a court, for certain offences alledged to have been committed by him at *Gibraltar*, such proceedings were had, that the court

martial, after hearing the charge and the defence, found the defendant guilty of receiving certain goods named, from the warehouse of *W.* (at *G.*) knowing them to be stolen, in breach of the articles of war, whereupon they sentenced him to tranportation for fourteen years, is good. For such a sentence would be warranted here by the stat. 4 *G.* 1. *c.* 11. if the principal were convicted of the felony, and the receiver were indicted as accessary after the fact. *R.* v. *Suddis.* 1 E.R. 306

SPECIAL OCCUPANT.

1. If an estate *pur autre vie*, be limited in trust for a man, his heirs, executors, administrators, and assigns, and be not devised, it descends to the heir as a special occupant, chargeable according to the statute of frauds (29 *Car.* 2. *c.* 3.); and therefore the administratrix of the person last seised cannot recover the title deeds thereof from the heir. *Atkinson* v. *Baker.* 4 T.R. 229
2. The stat. 29 *Car.* 2. *c.* 3. § 12. nor the stat. 14. *G.* 2. *c.* 20. § 9. appropriating estates *pur autre vie*, where there is no special occupant, do not extend to copyholds.
Zouch d. Forse v. *Forse*, 7 E. R. 186
3. There can be no general occupancy of a copyhold because the freehold is always in the Lord. 7 E. R. 186

STAMPS.

1. A broker, when he bought goods for his principal, agreed for an half *per cent.* to indemnify him from any loss on the re-sale: it was held that this *agreement*, if reduced to writing, need not be stamped under stat. 23. *G.* 3. *c.* 58. it being a *contract relating to the sale of goods*, which by § 4. of that statute is exempted.
Curry v. *Edensor.* 3 T. R. 524
2. A guarantee in writing, for the payment of goods thereafter to be purchased by a third person to a certain amount, is within the exception of the stamp acts, "a contract for or *relating to* the sale of goods," and need not be stamped.
Warrington v. *Furbor.* 8 E. R. 242
3. But an executory agreement for the making and putting up of certain machines in the party's house is required to be stamped like any other agreement, not being within the exception.
Buxton v. *Bedall.* 3 E. R. 803
4. So a written agreement for the sale of all the hops which shall be grown upon a certain number of acres of land, to be delivered in pockets at a certain place, must be stamped, not being within the exception.
Waddington v. *Bristow.* 2 B. & P. 452
5. A mere *cognovit* need not be stamped.
Ames v. *Hill.* 2 B. & P 150
6. But if it contain any terms of agreement it must.
Ib. and *Reardon* v. *Swaby.* 4 E.R. 188
7. An agreement to confess judgment for 30*l.* to secure 5*l.* and costs, is not an agreement for more than 30*l.* within the 23 *G.* 3. *c.* 58. § 4. and therefore need not be stamped. 2 B. & P. 150
8. An indorsement on an annuity deed, containing a clause of redemption, if made subsequent to the execution of it, must be stamped, otherwise it cannot be received in evidence.
Schumann v. *Weatherhead.* 1 E.R. 537
9. A schedule of goods referred to in a deed, to which it was annexed, must have the proper deed stamp by stat. 37 *G.* 3. *c.* 90. § 7. according to the number of words and sheets, and not merely the single schedule stamp of 2*s.* 6*d.* imposed by the first section of the act. *Lake* v. *Ashwell.* 3 E. R. 326
10. A warrant of attorney to confess judgment being liable as a deed to a stamp duty of 10*s.* by various statutes prior to the 37 *G.* 3. *c.* 111., which imposes an additional duty of 10*s.* on all deeds, with an *exception* of bonds and *letters of attorney*, is within such exception, and therefore liable only to a duty of 10*s.* as before that statute.
Barrow v. *Mashiter.* 4 E. R. 431
11. An award in writing, and under seal, need not have a deed stamp, unless *delivered as a deed*; but being only delivered *as an award*, it is sufficient if it have the award stamp of 10*s.*
Brown v. *Vauser.* 4 E. R. 584
12. Nothing being referred to appraisers except the mere value of goods and of the repairs of a farm, an appraisement stamp upon the written valuation is sufficient under the statute 46 *G.* 3. *c.* 43. and an award stamp is not necessary. *Leeds* v. *Burrows*, 12 E. R. 1
13. An unstamped draft drawn on *A*, *B.*, bricklayer, is not within the exception of 23 *G.* 3. *c.* 49. § 4. in favour of drafts drawn on persons acting as bankers within ten miles of the place where the draft is drawn: and if at the bottom of such draft there be an acknowledgment of the drawer,

that a third person paid it for him, that acknowledgment cannot be received in evidence; because, if received it would give effect to the draft.

Castleman v. *Ray*. 2 B. & P. 383

14. The assignment of a lease in writing without seal, did not require a stamp before the 44 *G*. 3. *c*. 98. If a parol warranty and agreement to assign be reduced into writing, but not stamped, and the assignment be afterwards legally executed, the warranty cannot be proved by parol.

Hodges v. *Drakeford*. N. R. 270

15. A letter written by a son who managed his mother's trade for her to a creditor of her's, containing a promise to pay her debt, need not be stamped, by statute 23 *G*. 3. *c*. 58., as falling within the exception in stat. 32 *G*. 3. *c*. 51., by which letters between *persons carrying on trade* are exempted from the duty.

Mackenzie v. *Banks*. 5 T. R. 176

16. Articles of agreement under seal cannot be given in evidence, unless stamped with a deed stamp; although the agreement stamped is of the same value but differently formed.

Robinson v. *Drybrough*. 6 T. R. 317 (But see stat. 37 *G*. 3. *c*. 136.)

17. If an interest in land be of the value of 20*l*. an agreement for it requires an agreement stamp.

Emmerson v. *Heelis*. 2 W. P. T. 38

18. A draft on a banker, post-dated and delivered before the day of the date, though not intended to be used till that day, requires to be stamped by the stat. 31 *G*. 3. *c*. 25.

Allen v. *Keeves*, 1 E. R. 435
Whitwell v. *Bennet*. 3 B. & P. 559

19. A promissory note, written upon a stamp of greater value than the proper stamp required, cannot be received in evidence, though the stamp were applicable to the same kind of instrument. *Farr* v. *Price*. 1 T. R. 55

20. So a promissory note, drawn before the 37 *G*. 3. *c*. 136. upon a receipt stamp of equal value with that required for such promissory note, is not valid.

Chamberlain v. *Porter*. N. R. 30

21. The proper stamp for a promissory note of 45*l*. is 1*s*. 6*d*. composed of three different sums, applicable to different funds under three acts of parliament. But such a note on a 2*s* stamp composed of three different sums applicable to the same funds, though in larger proportions to each than was required, was holden valid.

Taylor v. *Hague*. 2 E. R. 414

22. A promissory note for 100*l*. payable to the plaintiff, or order, and originally expressed to be *for value received*, generally, being altered the next day, upon the suggestion of one of the parties, by the addition of the words *for the good-will of the lease and trade of Mr. K. deceased*, requires a new stamp; such words being material, and not having been originally intended to be inserted, and omitted by mistake.

Knill v. *Williams*. 10 E. R. 431

23. If a bill given in discharge of a debt is inadmissible by being on an improper stamp, the plaintiff may prove his original debt.

Brown v. *Watts*. 1 W. P. T. 353

24. *A*. and *B*. having exchanged their acceptances of bills drawn by each on the other at so many days date: held that the delivery of the respective bills for acceptance, and the re-delivery of the same by the acceptors to the respective drawers, was a negociation of the bills; and that such bills could not, after they had been so exchanged for valuable consideration (as the exchange of acceptances is) for 20 days, be post-dated without a new stamp, as upon new bills; although during all that time each had remained in the hands of the original drawer.

Cardwell v. *Martin*. 9 E. R. 190

25. The Court of C. P. refused to make a rule on a plaintiff, who brought an action on a bond, to an officer of the stamp duties to inspect the bond, because the defendant, suspected it to be forged.

Chetwind v. *Marnell*. 1 B. & P. 271

26. Goods and specie to a certain amount having been insured by a policy on ship or ships which should sail on the voyage insured between the 1st of *October* 1799, and the 1st of *June* 1800; a memorandum written on the policy on the 11th of *June*, extending the time of sailing to the 1st of *August* 1800, does not require a new stamp; being within the 13th section of the stat. 35 *G*. 3. *c*. 63. which provides that the act imposing the stamp shall not extend to prohibit the making any lawful alteration in the *terms* or *conditions* of any policy, &c. *Kensington* v. *Inglis in Error*. 8 E. R. 273

27. A policy effected on "ship *and outfit*," on a voyage upon the Southern Whale Fishery out and home, cannot be altered by consent after the ship sails, and the risk attaches, to an insurance on "ship *and goods*," without a new stamp; *out-fit* the subject-matter of insurance, being essentially different in such a voyage from *goods;* and therefore not within the exception of the stat. 35 *G.* 3. *c.* 63. § 13. which allows alterations in the *terms* or *conditions* of a policy, without having a new stamp, so that the thing insured remains the property of the same persons, &c.
Hill v. *Patten.* 8 E. R. 373

28. And the policy of insurance in the last case having been underwritten on "ship *and outfit*, was after the ship sailed declared, by consent of all parties, to be on ship *and goods*, by a memorandum written on a blank space in the body of the policy; but without any new stamps: and it having been decided in the last case that for want of the stamp the plaintiff could not recover as upon a policy on ship *and goods*, as declared by the memorandum, it was now held that he could not recover upon the policy in its original state, as an insurance on "ship *and outfit*," by reason of the alteration apparent upon the face of the instrument itself, and which was made by parties interested.
French v. *Patton.* 9 E.R.351

29. The same paper containing two different contracts for the purchase of different lots by different persons at an auction, one stamp affixed on that part of the paper which contained the contract of sale with the defendant, and to which the stamp officer's receipt for one penalty referred, is sufficient to legalize the evidence of such contract. *Powell* v. *Edmunds.* 12E.R.6

30. If on a sale by auction the same person is declared the highest bidder for several lots, a distinct contract arises for each lot; and although all the lots together amount to a greater value than 20*l.* no stamp is required if the lots were *separately* of less value than 20*l.* *Emmerson* v. *Heelis.* 2 W.P.T.38

31. An agreement by several for a subscription to a fund for making a wet dock requires only one stamp. *Davis* v. *Williams* (*Lady.*) 13 E. R. 232

32. Where an instrument contained a general written contract of demise to several different tenants for different estates at different rents, set against each signature, and one stamp only appeared on the paper, the Court of K. B. held that it was matter of circumstantial evidence to which contract such stamp should be applied.
Doe d. Copley (*Bt.*) v. *Day.* 13E.R.241

33. If two parts of an instrument are prepared, but one only is stamped, the party having the custody of the unstamped part may give secondary evidence of the contents of the agreement, if the other party refuse, on notice, to produce the stamped part.
Garnon v. *Swift.* 1 W. P. T. 507

34. The court in compelling a plaintiff to exhibit evidence to which the defendant is entitled to have access, will not compel such plaintiff to lay himself open to a prosecution under the stamp acts.
Whitaker v. *Izod.* 2 W. P. T. 115

STATUTES.

I. *Rules, as to Construction of, &c.*

1. Where the words of a statute are doubtful, general usage may be called in to explain them; but where they are clear, the usage of a particular place cannot controul them.
R. v. *Hogg.* 1 T. R. 728

2. Though the preamble of an act cannot control the clear and positive words of the enacting part, it may explain them if ambiguous.
Crespigny v. *Wittenoom.* 4 T. R. 793

3. The clauses of reference in the excise laws to former laws can only be taken to extend to the general powers and provisions of such acts, and not to every special clause. 2 T. R. 510

4. The distinction is between the laws of excise, properly so called, and those acts for raising inland duties under the management of the commissioners of excise. 2 T. R. 510

5. Acts of parliament relating to trade in general are public acts, but an act which relates to a certain trade only is a private one.
Kirk v. *Nowell.* 1 T. R. 125

6. An act empowering a bankrupt patentee, his executors, administrators, and assigns, to assign the patent right to a greater number of persons than allowed by the letters patent, and declared to be a public act, does not enable either the bankrupt or his assigns to make a better title than they could before the act.
Hesse v. *Stevenson.* 3 B. & P. 565

7. Statutes allowing certain privileges to the members of the universities are confined to those of the two *English* universities, unless otherwise expressed.
Jones v. *Smart*. 1 T. R. 49

8. Where an exception is *in the enacting clause* of a statute giving a right or a forfeiture, the party suing for the right or forfeiture must negative the exception in his declaration.
Gill v. *Scrivens*. 7 T. R. 27

9. Therefore in a *sci. fa.* on a judgment against a person who had been twice a bankrupt, under stat. 5 *G.* 2. *c.* 30. § 9., which says, "the future estate and effects of such person shall be liable to his creditors *unless* the estate shall produce sufficient to pay 15*s.* in the pound," &c. it is necessary for the plaintiff to averr that the bankrupt's estate has not paid 15*s.* in the pound.
7 T. R. 27

10. The bare recital in a subsequent statute is not sufficient to repeal the positive provisions of a former one.
Dore v. *Gray*. 2 T. R. 365

11. Where a statute professes to repeal absolutely a prior law, and substitutes other provisions on the same subject, which are limited to continue only till a certain time, the prior law does not revive after the repealing statute is spent, unless the intention of the legislature to that effect be expressed.
Warren q. t. v. *Windle*. 3 E. R. 205

12. A statute introductive of a new qualification as to the subject matter, though penned in the affirmative, repeals a former statute concerning the same matter. Therefore the stat. 13 *G.* 2. *c.* 28. § 5., exempting from the impress service any harpooner, &c. *seaman*, &c. in the *Greenland* trade, is impliedly repealed by st. 26 *G.* 3. *c.* 41. § 17. which exempts such harpooner, &c. *whose name shall be inserted in a list* required to be delivered on oath by the owner of the vessel to the collector of the customs; and which also exempts any *seaman* entered on board any ship intended to proceed on the said fishery in the following season *whose name shall be inserted in a list to be delivered as aforesaid*, and who shall have given *security*, &c. to proceed and shall proceed accordingly: for the latter statute superadds the insertion of the seaman's name in such list as a condition precedent to the exemption.
Ex parte Caruthers. 9 E. R. 44

13. If a statute expire, and afterwards be revived again by another statute, the law derives its force from the first.
Shipman q. t. v. *Henbest*. 4 T. R. 109

14. And therefore stat. 21 *Jac.* 1. *c.* 4. extends to statutes made since, which revive statutes made before. 4 T. R. 109

15. A contract declared by statute to be illegal, is not made good by a subsequent repeal of the statute.
Jaques v. *Withy*. 1 H. B. 65

16. An act of parliament which is to take effect "from and after the passing of the act," operates by legal relation from the first day of the session.
Latless v. *Holmes*. 4 T. R. 660

17. The annuity act (17 *G.* 3. *c.* 26.) is is of this description. 4 T. R. 660
(But see stat. 33 *G.* 3. *c.* 13., by which the operation of every statute is to commence from the time of receiving the royal assent, unless any other period is appointed in the act.)

18. By § 1. of statute 39 and 40 *G.* 3. *c.* 104. the jurisdiction of the Court of Requests in *London* is enlarged from debts of 40*s.* to 5*l.* from the 30th *September* 1800; and by § 12., if any action *shall be commenced* in any other court to recover any debt not exceeding 5*l.* within the jurisdiction, the plaintiff shall not recover any costs, &c.: held, that the words "*shall be commenced*" must by necessary construction be restrained to the date of the 30th *September*, and not to the passing of the act, which was on the 9th of *July* preceding.
Whitborn v. *Evans*. 2 E. R. 135

19. If the judgment of commissioners of appeal in certain cases be declared final by statute, it cannot be questioned in an action of trespass.
Radnor (*Earl*) v. *Reeve*. 2 B. & P. 591

20. The construction of statutes, though relating to matters of an ecclesiastical nature, belongs to the superior courts of common law.
Gould v. *Gapper*. 5 E. R. 345

21. A canal act provided that the canal commissioners should not be intitled on purchasing lands to any coal mines, &c. under the same, but that such mines should belong to the same persons as would have been entitled to them if the act had not been made; but the owners were to give notice to the commissioners of their intention to work the mines within a certain distance of the canal, and that the commissioners might inspect the

mines and stop the working of them, paying compensation therefore: held that if after notice given by the owners to the company the latter did not purchase out the owner's rights, and the canal being damaged by the mine after such notice and non-purchase, an action could not lie against the coal owners for such injury, as it happened by the default of the commissioners in not purchasing. *Wyrley and Essington Canal Navigation* v. *Bradley & al.* 7 E. R. 368

22. The *St. Alban's* paving and regulating act, 44 *G.* 3. empowers five commissioners, *assembled at a public meeting holden by virtue of the statute*, to do certain acts; amongst others, to deliver *notice in writing* to any inhabitants to abate nuisances and encroachments in the street before their houses; and on failure, empowers the commissioners to abate them: and gives an *appeal* to the Quarter Sessions of the borough "against any matter or thing to be done by the commissioners in pursuance of the act: the Court of K. B. held that an appeal lay against such *notice in writing*; such construction being within the words of the act, &c. and most beneficial for the commissioners themselves, as well as for the inhabitants whose property was to be affected by such acts.

R. v. *Kingston & al.* 8 E. R. 41

23. Though the act says, that "all monies paid, expended by, or recovered against the commissioners or their treasurer, &c. by means of any action, prosecution, &c. or *appeal*, for any cause relating to the act, or any thing done by or under the authority of the same, shall be defrayed out of the money in the hands of the treasurer; it does not extend to discharge the commissioners from personal responsibility, in the first instance, for the costs of an appeal awarded to be paid by them; however, they may afterwards reimburse themselves out of the fund in the treasurer's hands. 8 E. R. 41

24. A turnpike act imposing a toll on every carriage and on every horse passing through the gate, and exempting any person from paying more than once in a day for passing or repassing with the same carriage or horse, exempts the traveller from paying a second time in the day for the passage of the *same carriage*, though drawn by *different horses*, being the same in number. And another clause providing that in all cases of *carriages travelling for hire*, the traveller or passenger therein shall be considered as the person paying the toll, and that such payment shall not exempt such carriages repassing with a different traveller or passenger, does not extend to *stage coaches*, the *carriage itself* not being there *hired* by the respective passengers, but only a conveyance by it: and therefore such stage coaches are freed of toll under the former clause by one payment in the day, although returning with different passengers and different horses, the horses being the same in number.

Williams v. *Sangar.* 10 E. R. 66

25. Freemen of *Norwich*, substitutes in the militia quartered at *Colchester* but having dwelling houses in *Norwich* in which their families resided, and to which they at times resorted on furlough, held to be *inhabitants* within the meaning of the charter of *Norwich* and of a local act requiring them to have been inhabitants for six calendar months previous to certain elections of corporate officers in order to qualify them to vote.

R. v. *Mitchell.* 10 E. R. 511

26. Where by statute a canal company were empowered to take such rates as should be fixed at a general assembly of the proprietors, not exceeding 1*d.* &c. per ton per mile, upon coal; and they were also empowered to reduce the rates at a general assembly held on certain notice; but no reduction was to be made without the consent of the major part in value of the proprietors; a contract made by individuals with the company, but not at such general meeting, whereby, in consideration that those individuals would make a navigable cut to convey water from their collieries, through land not within the the statuable line of the canal, into the canal, and convey the same to the company, the latter should permit them to carry their coals through the cut and along the canal for 1*s.* per ton, *the company paying back 6d. per ton*, is illegal and void; 1st, As a speculation by which the company might gain more or less than the legislature intended they should take under similar circumstances from the public in general. 2dly, As extending in effect the power of the company to purchase lands

beyond the limits assigned by the act. 3dly, As enabling them to raise more capital than they were entitled by the act to do, by means of paying for land or works by a total or partial sale of their tolls; which tolls are made a security for the money subscribed or taken upon mortgage. 4thly, Because the tolls could in no instance be reduced but at a general assembly, &c. and this in fact operates as a reduction of the tolls *pro tanto*. Also *Quære*, 5thly, Whether such a contract be not void, as diminishing the inducement (by favouring individuals) to a general reduction of the tolls, when proper, for the benefit of the public? *Lees & al.* v. *Manchester Canal Navigation.* 11 E. R. 645

27. One person acted as clerk to two bodies of public officers. A notice of action required by the statute was given him, addressed to him as clerk to the one body, the cause of action arising under the authority of the other body. Held that the notice was insufficient. *Hider* v. *Dorrell.* 1 W. P. T. 383

28. An inclosure act gave power to the commissioners to award in what townships the allotments should be assessed to the rates and taxes. They awarded that certain allotments which before were within the district of *H.* were *within* the township of *C.* Held that they did not thereby become rateable in *C.* *Fenton* v. *Boyle & al.* 1 W. P. T. 344

II. *Points on particular Statutes.*

(And see the TABLE OF STATUTES at End of this Digest.)

1. The statutes 8 *H.* 6. *c.* 16. and 18 *H.* 6. *c.* 6., prohibiting the granting to farm of lands seised into the king's hands, upon inquest before escheators, until such inquest be returned in the Chancery or Exchequer, and for a month afterwards, *if the king's title in the same be not found of record*, unless to the party grieved who shall have tendered his traverse to such inquest; and avoiding all grants made contrary thereto; extend to the case of an escheat upon the death of the tenant last seised, without heirs, where no immediate tenure of the crown was found by the inquest. And as the crown could not grant to a stranger in such a case without office, neither can the plaintiff in ejectment recover upon the demise of the crown. *Doe d. Hayne & the King* v. *Redfern.* 12 E. R. 96

2. The stat. 23 *H.* 6. *c.* 9. relating to bail-bonds is a public act; therefore the court will take notice of it though it be not pleaded. *Samuel* v. *Evans.* 2 T. R. 569

3. And if it appear in a declaration by the assignee of a sheriff on such bond, that the bond is void by the provisions of that statute, the court on motion will arrest the judgment after verdict against the defendant upon a plea of *non est factum.* 2 T. R. 569

4. Where the writ was to appear before the King, *wheresoever he should then be in England*, and the sheriff took a bail bond for the party's appearance before the King *at Westminster* on the day named in the writ; held to be a substantial compliance with the stat. 23 *H.* 6. *c.* 9. so as to entitle the assignee of the sheriff to recover on such bond. *Jones* v. *Stordy.* 9 E. R. 55

5. A curate of an augmented curacy by Queen *Anne's* bounty is not liable to the penalties of stat. 21 *H.* 8. *c.* 13. for non residence. *Jenkinson q. t.* v. *Thomas.* 4 T. R. 665

6. That act only extends to parsonages and vicarages. 4 T. R. 665

7. After a creditor has distrained for rent the goods of his debtor, who was also under engagement with the creditor's agent for the sale of his good, for the purpose of discharging the rent, and also certain book debts due to such creditor and his agent, the debtor confessed judgment to the defendant, another creditor, for a large nominal sum, with a defeazance that execution should only issue for such an amount as would cover the debt of the defendant, and all the other creditors, amongst whom a rateable distribution was to be made: held, that such judgment confessed, being in fact made *bonâ fide*, and upon good consideration, was not covenous or fraudulent within the statute 13 *Eliz.* *c.* 5., although its effect might be to delay or hinder such first-mentioned creditor from recovering the whole amount of his demands. Neither could it be said to delay or hinder at all his recovering the rent due to him, and for which he had distrained; such distress having a legal priority. But it seems that the penalty given by the third clause of the statute attaches as well upon a covenous judgment as a covenous bond, though the latter alone be named in that part of the clause. *Meux q. t.* v. *Howell.* 4 E. R. 1

8. The stat. 1 *Jac.* 1. *c.* 22. § 40. which gives a penalty of 5*l.* against any person resisting the searchers appointed by that act, in searching for and seizing goods made of leather, ill tanned or wrought, does not attach upon a tradesman who purchases such goods ready made, though with intent to sell again, but only upon the original makers of such ill-wrought goods. *Mason q. t.* v. *Middleton.* 3 E. R. 334

9. If a person carrying on within a borough one of the trades mentioned in the 1 *Jac.* 1. *c.* 22., viz. that of a cutter and worker of leather, expose to sale shoes manufactured without the borough, and purchased by him ready made, the searchers may seize them under § 32, if made of leather insufficiently tanned. *Hodgson* v. *Rickard & al.* 2 N. R. 389

10. Whether the stat. 1 *Jac.* 1. *c.* 27. (as to killing game) be repealed by the stat. 22 & 23 *Car.* 2. *c.* 25.? *Qu.* *R.* v. *J. A. Harris.* 7 T. R. 238

11. The statute 16 & 17 *Car.* 2. *c.* 8. which says that judgment shall not be arrested for want of the words *vi et armis*, or *contra pacem*, in actions of trespass, only applies to those cases that appear on the face of the declaration to have been evidently intended to be actions of trespass; and not to a case where the memorandum is of "an action of trespass on the case." *Savignac* v. *Roome.* 6 T. R. 125

12. A sale of goods made on a *Sunday*, which is not made in the exercise of the *ordinary calling* of the vendor, or his agent, is not void at common law, or by the stat. 29 *Car.* 2. *c.* 7. *Drury* v. *Defontaine.* 1 W. P. T. 131

13. Where judgment is entered on a warrant of attorney, though a bond also is given, it is not necessary under 8. & 9. *W.* 3. *c.* 11. to suggest breaches. *Austerbury* v. *Morgan.* 2 W. P. T. 195

14. The stat. 8 & 9 *W.* 3. *c.* 31. § 1., which directs the form to be pursued in a writ of partition, applies only to cases where the tenant does not appear. *Dyer* (*dem.*) v. *Bullock & al.* (*ten.*) 1 B. & P. 344

15. By stat. 10 and 11 *W.* 3. *c* 8. the proprietors of navigation shares in the river *Tone*, are created a corporation with certain funds, directed to keep an account of their receipts and disbursements, which shall every year be *examined, stated, corrected* and *allowed* by the Bishop of *Bath* and *Wells*, and the justices of the peace for the county of *Somerset*, or any five or more, at their first General Quarter Sessions after a certain day, at which time they are to direct a distribution of the surplus profits, if any: held, that the Sessions in one year have no authority to revise or correct any errors in the accounts, upon which a balance was struck and allowed, at the Sessions in any preceding year. *R.* v. *Conserv. of Riv. Tone.* 8 T. R. 286

16. If manifest injustice has been done by the allowance of the accounts in any former year, the only remedy is in Chancery. 8 T. R. 291

17. An action on the case lies upon the stat. 6 *G.* 1. *c.* 16. § 1. by the party grieved, to recover damages against the inhabitants of the adjoining township, for trees, coppice, and underwood, unlawfully and feloniously burnt by persons unknown; though the clause directs the party grieved to recover the damages *in the same manner and form* as given by the stat. 13 *Ed.* 1. stat. 1. *c.* 46. "for dikes and hedges overthrown by persons in the night;" upon which the usual course of proceeding has been by the writ of *noctanter*. *Thornhill* v. *Township of Huddersfield.* 11 E. R. 349

18. The declaration in an action on the statute 9 *G.* 1. *c.* 22. § 8., to recover damages against the hundred for the value of a stack of corn maliciously burnt, alleged that notice of the fact was given within two days to the inhabitants of the *parish* (instead of the "*town, village, or hamlet,*" which are the words of the act), near the place, &c; yet as the law *primâ facie* intends every *parish* to be a *vill*, unless the contrary be shewn, this allegation is sufficient after verdict to sustain judgment for the plaintiff. But if it had been shewn at the trial that the parish consisted of several vills, and that the notice had been given to one more distant than another, the defendants would have been entitled to a verdict. *Cook* v. *The Hundredors of Pimhill,* 12 E. R. 173

19. A party in a cause having changed his attorney in the progress of it, a judge's order was afterwards obtained by the second attorney for the delivery of a bill signed by the first attorney under the statute 2 *G.* 2. *c.* 23. § 23. which delivery was accordingly made to the second attorney in the cause: held that this was a sufficient delivery to *the party to be charged*

therewith, within the words and meaning of that statute, so as to enable the first attorney to bring his action against the client for the amount of such bill.

Vincent v. *Slaymaker*. 12 E. R. 372

20. In *March* 1802 the stat. 3 *G.* 2. *c.* 26. § 13. giving a penalty against dealers in coals within the metropolis, and ten miles round, for not justly measuring coals sold by the chaldron, according to the lawful bushel directed by the statute 12 *Ann*, stat. 2. *c.* 17. § 11. was a subsisting law: and held that evidence of such coals proving short upon re-measurement was admissible to prove the charge of their not having been *justly measured*. But *Qu.* Whether the statute 3 *G.* 2. *c.* 26. were a subsisting law after *July* 1802, when the stat. 26 *G.* 3. *c.* 108. was revived by the stat. 42 *G.* 3. *c.* 89?

Warren q. t. v. *Windle*. 3 E. R. 205 (And see *ante* I. 11.)

21. A dealer in coals by the chaldron who sold to another *by the chaldron* a certain quantity *as and for* 10 *chaldrons of coals, pool measure*, without justly measuring the same with the lawful bushel of Queen *Ann*, is liable to the penalty of 50*l.* imposed by the 13th section of the stat. 3 *G.* 2. *c.* 26. upon such defaulters who sell coals *by the chaldron or lesser quantity* without measuring them.

Parish q. t. v. *Thompson*. 2 E. R. 525

22. The stat. 5 *G.* 2. *c.* 20. which inflicts a penalty of 20*l.* on persons piloting ships *down the Thames*, &c. only extends to vessels sailing *on foreign voyages*, and not to those which, having performed their voyages, are steered from one wharf to another on the river, for the purpose of unloading their cargoes. *R.* v. *Lambe*. 5 T. R. 76

23. In a subsequent case the Court of B. R. recognized this judgment; and held generally, that under this statute it is only necessary to have a regular pilot when a vessel is sailing on the *Thames in the course of her voyage in or out:* up or down the river.

R. v. *Neale*. 8 T. R. 241

24. Jobbing in *omnium* is within the stat. 7 *G.* 2. *c.* 8. 7 T. R. 630

25. The plaintiff being possessed of 3000*l.* 4 *per cent.* stock, empowered defendant to sell the same for his own benefit: in consideration of which defendant agreed to transfer at the next opening 3000*l.* 4 *per cent.* into the plaintiff's name; held that this was not a case prohibited by 7 *G.* 2. *c.* 8. but that on failure of the defendant's engagement, the plaintiff might maintain an action against him to recover the value of that stock on the day appointed for the transfer.

Sanders v. *Kentish*. 8 T. R. 162; and see *Tate* v. *Wellings*. 3 T. R. 531

26. In an action on the stock-jobbing act, 7 *G.* 2. *c.* 8. § 6. to recover damages against one who had refused to accept and pay for stock agreed to be sold to him, it is necessary to prove an actual transfer of the stock to some other person before the action brought; and proof alone of a contract to sell to such other person *before* the action brought, though followed up by an actual transfer *afterwards*, is not sufficient to maintain the action.

Heckscher v. *Gregory*. 4 E. R. 607

27. It is an offence within the statute 7 *G.* 2. *c.* 19. to mix the vapour of sulphur and brimstone with hops.

R. v. *Pack*. 6 T. R. 374

28. Tumbling is not an entertainment of the stage within the meaning of statute 10 *G.* 2. *c.* 28.

R. v. *Handy*. 6 T. R. 286

29. Neither a certificate from the judge, nor a suggestion on the roll, is necessary to entitle a defendant to double costs, under 11 *G.* 2. *c.* 19. § 21.

Finlay v. *Seaton*. 1 W. P. T. 210

30. Exchequer bills, purchased by the bank for a good consideration, but signed in the name of the auditor of the Exchequer by a person not legally authorized, are *securities*, or at least *effects*, within the meaning of statute 15 *G.* 2. *c.* 13. § 12.: and if a servant of the bank embezzle such bills, he may be convicted of felony under that statute. *R.* v. *Aslett*. 1 N. R. 1

31. By the vagrant act, statute 17 G. 2. *c.* 5., after a rogue and vagabond has been committed till the Sessions, and they adjudging him to be a rogue and vagabond, order him to be further imprisoned and kept to hard labour for six months, and to be publicly whipped during that time, and that after the expiration of his imprisonment he should be sent and employed in His Majesty's service, pursuant to the statutes: held that the whole forms one sentence, and being defective in the latter part for want of adjudicating whether the Sessions state whether by sea or land, the conviction shall be quashed though the former part be valid. *R.* v. *Patchett*. 5 E. R. 339

32. The statute 20 *Geo.* 2. *c.* 19. giving the magistrates jurisdiction to determine differences between masters and servants in husbandry, artificers, handicraftsmen, miners, potters, &c. "and "*other labourers*," employed for any certain time, or in any other manner," respecting wages within certain sums, extends to *labourers* of *all* descriptions, and not merely in the particular trades or business there enumerated: and consequently includes *wages* earned by a *labourer*, who contracted to dig and stean a well for cattle, to be paid for by the foot, and who employed another to assist him in the work.
Lowther v. *Radnor (Earl.)* 8 E. R. 113

33. The statute 20 G. 2. *c.* 19. § 4. enabling two magistrates, "upon application or complaint made upon oath by any master against such apprentice" as is described in the act, touching any misdemeanor in such service, to hear and determine the same, and to commit or discharge the apprentice, extends to a complaint in writing preferred by the master, and verified by the oath of another person. *Finley* v. *Jowle.* 12 E. R. 248

34. Statute 31 G. 2. *c.* 10. § 30. (inflicting a penalty of 50*l.* on navy-agents taking more than 6*d.* *per* £ for receiving and paying over wages, &c. to any officer, seaman, &c. in the royal navy, and for all their trouble and attendance therein), is not confined to *inferior* officers and seamen: and therefore navy agents receiving of a lieutenant more than 6*d.* *per* £ on the sum received and paid over by them, though not more than that rate on the whole account of debtor and creditor, including sums drawn for by the lieutenant on the navy office, and carried to his account there (which is authorized by 35 G. 3. *c.* 94. making special provision for paying the wages, &c. of commissioned officers), are liable to the penalty: and the latter act is not a repeal of the former in this particular.
Walsh v. *Toulmin & al.* 6 E. R. 541

35. One, not a general trader in silver plate, who sells a piece of plate in a particular instance for a price above the value of old silver, is not therefore *a vender of plate* within the stat. 31 G. 2. *c.* 32. § 6., which enacts that all persons using the trade of selling plate, &c. shall be deemed traders in, sellers, or venders of plate, &c. and shall take out a licence.
R. v. *Buckle.* 4 E. R. 346

36. A sheriff's officer is not liable to the penalties of 32 G. 2. *c.* 28. § 1. for carrying a person taken in execution to prison within twenty-four hours; that clause only relating to persons arrested on mesne process.
Evans v. *Atkins.* 4 T. R. 555

37. By statute 3 G. 3. *c.* 15. no person claiming to vote at an election of members of parliament *as a freeman* can vote unless he has been admitted to his freedom for 12 months: this extends to *burgesses*, who vote at such elections, as well as freemen.
Williams v. *Evans.* 8 T. R. 246

38. That branch of § 19. of statute 13 G. 3. *c.* 78. (the general highway-act) which directs that "when any highway *hath been* diverted above twelve months, &c. if a new highway *hath been* made in lieu thereof, and the same *hath been* acquiesced in, &c. every such new highway shall, from *thenceforth*, be the public highway," is *retrospective* only: and it is not extended by § 7. of 34 G. 3. *c.* 74., incorporating all the clauses and provisions of the act 13 G. 3.
Waite v. *Smith.* 8 T. R. 132
Another part of § 19. of statute 13 G. 3. *c.* 78. provides for the diverting of highways for the future. 8 T. R. 133

39. A presentment by a magistrate under stat. 13 G. 3. *c.* 78. § 24., of a nuisance in a highway must expressly allege the offence to be done against the form of the statute.
R. v. *Winter.* 13 E. R. 258

40. The stat. 13 G. 3. *c.* 80. gives a penalty in case of killing game on a *Sunday*, and directs that it shall be forthwith paid on conviction, and that in case of neglect or refusal to pay, or give security for the payment of it, the justice shall by warrant under his hand and seal, cause the same to be levied by distress and sale of the offender's goods; and that it shall be lawful for such justice to order such offender to be detained in custody, until return may conveniently be made to such warrant of dirtress, unless the party convicted shall give security for his appearance, &c.: the Court of K. B. held that such order to detain in custody until the return of the warrant of distress may be by parol.
Still v. *Walls & Harris.* 7 E. R. 533

41. The general turnpike act 13 G. 3. c. 84. § 13. having given a penalty, to be recovered by information before justices of peace, or by action, for using a greater number of horses than is thereby allowed for the draft of waggons, &c. on the road; and the 19th section having provided, that if it appear on oath to the satisfaction of any justice of the peace or court of justice, that the carriage could not be drawn with the ordinary number of horses, by reason of deep snow or ice, then such justice of peace or court may *stop all proceedings* before them respectively: the Court of K. B. held that such application for a stay of proceedings must be made to the court above in which the action was brought, and that the defence is not available at *nisi prius*.

Robinson v. *Pocock*. 11 E. R. 484

42. The statute 17 G. 3. c. 42., which requires bricks for sale to be of certain dimensions, and gives a penalty for the breach of that regulation, being passed to protect the buyer against the fraud of the seller, if bricks be sold and delivered under the statutable size, unknown to the buyer, the seller cannot recover the value of them.

Law v. *Hodgson*. 11 E. R. 300

43. By statute 19 G. 3. c. 74., the clerk of assise on each circuit, is entitled to receive a certain fee for every person convicted of a transportable offence (except petty larceny), and sentenced to transportation, hard labour, or confinement in the house of correction; and for persons capitally convicted, who afterwards have received the king's pardon on condition of being transported or imprisoned.

Fleetwood v. *Finch*. 2 H. B. 220

On the *Norfolk* circuit, that fee is one guinea. 2 H. B. 220

44. A commitment in execution of a rogue and vagabond under statute 28 G. 3. c. 88. should state that the defendant was apprehended with the implements of house-breaking upon him *at the time of such apprehension, &c.*

R. v. *Brown*. 8 T. R. 20

45. An excise-officer seizing soap in the execution of his office *at any distance from the sea*, is within the protection of 24 G. 3. stat. 2. c. 47. § 13.

R. v. *Brady & al. (in Cam. Scac.)* 1 B. & P. 187

46. Nothing but a power of attorney or will, complying with the provisions of stats. 29 G. 3. c. 63: 32 G. 3. c. 24. will warrant the payment to third persons, of money due from the public to sailors and marines.

Semble. 1 B. & P. 161

47. The time for ships engaged in the southern whale-fishery to be out on their voyage, in order to gain their premiums under stat. 28 G. 3. c. 20., is fourteen *lunar* months from the time of their *clearing out*, without regard to the time of their actual sailing.

Lacon v. *Hooper*. 6 T. R. 224

48. It is an offence within the statute 28 G. 3. c. 38. § 31. to press together *yarn* made of wool; and a declaration or information on this act need not aver that *it was in such a state as might be reduced to and used as wool again*.

Dyer v. *Hainsworth*. 3 T. R. 611

49. *Semble*, such averment is only necessary in the case of a prosecution for "*pretended manufactures*."

3 T. R. 611

50. No hawker can expose goods to sale in any part of a market-town but the public market-place, by stat. 29 G. 3. c. 26. § 16. 17.

R. v. *Redfearne*. 4 T. R. 273

51. It seems that no society is within the intent and meaning of the friendly society act, 33 G. 3. c. 54. so as to require the justices in sessions to allow and confirm their rules, &c. in the manner therein provided for, if it appear that the general objects of such society are not confined to the charitable relief and maintenance of its old, sick, and infirm members, their widows, and children. *R.* v. *Staffordshire (Justices.)* 12 E. R. 280

52. The statute 34 G. 3. c. 68. § 18. giving a summary conviction against any master of a vessel, who, having received the certificate of its register, shall wilfully *detain and refuse to deliver up the same to the proper officers empowered to make registry*, &c. on the requisition of the owner or major part owners, will not authorize the conviction of a master who did not comply with the requisition of the *sole owner* to deliver up such certificate to him, though expressed to be for the purpose of providing the necessary indorsement to be made on it at the custom-house upon the transfer of the ship. *R.* v. *Pixley*. 13 E. R. 91

53. The condition of a bond after reciting the grant of an annuity by the Prince of *Wales* to *J. C.*, an assign-

ment of the same to the obligee with the assent of the Prince, and an agreement that the obligor should give his bond as an additional security, was declared to be, that if the Prince or his treasurer, or any person for him should pay the annuity quarterly to the obligee, the bond should be void. Held, that upon failure of payment the obligee was entitled to sue the obligor, without having first presented a particular of his demand to the Prince's treasurer, pursuant to 35 *G.* 3. *c.* 125. § 7. *Sparkes* v. *O'Kelly.* 2 N. R. 421: and *O'Kelly* v. *Sparkes (in error.)* 10 E. R. 369

54. The unlawful administering, by any associated body of men, of an oath to any person, purporting to bind him not to reveal or discover such unlawful combination or conspiracy, nor any illegal act done by them, &c. is felony within the statute 37 G. 3. *c.* 123., though the object of such association were a conspiracy to raise wages and make regulations in a certain trade, and not to stir up mutiny or sedition.

R. v. *G. Marks.* 3 E. R. 157

55. The local act 39 *G.* 3. *c.* 69. § 137. giving to *West India* ships, which have discharged their homeward bound cargoes in the docks of the *West India* Company, "the use of the light dock for a time not exceeding six months from the time of unloading," on payment of the tonnage duty of 6*s.* 8*d.*, payable on the entrance of such ships into the import dock, does not entitle the owners to ship stores intended for the use of such ships as part of their outfit, over the wharves of the light dock, without payment of wharfage and porterage, as in case of other goods shipped by way of merchandize on the outward bound voyage: aliter, as to necessaries intended for the immediate use of such ships while lying in the dock during the time allowed by the act.

Blackett v. *Smith.* 11 E. R. 533

56. One convicted upon the stat. 9 and 10 *W.* 3. *c.* 41. § 2. of having unlawfully in his possession, or concealing, the king's naval stores, cannot since the stat. 39 & 40 *Geo.* 3. *c.* 89. § 2. be sentenced to hard labour.

R. v. *Bridges.* 8 E. R. 53

57. The pawnbrokers' act 39 & 40 G. 3. *c.* 90. having enacted that they shall and may take, by way of profit, a certain rate of interest on pledges, *and no more;* the taking of more is an offence within the act, cognizable by a justice of peace on summary information within the 26th section; which, (after providing specific penalties for specific offences) says that "for every other offence against this act, where no forfeiture or penalty is provided or imposed on any particular or specific offence against any part of this act," the pawnbroker offending against this act shall forfeit not lies than 40*s.* nor more than 10*l.* in the discretion of the justice.

R. v. *Beard.* 12 E. R. 673

58. The stat. 42 *G.* 3. *c.* 38. forbids corn making into malt to be wetted, while it is a-floor, before 12 days from the time when it is emptied out of the cistern. The stat. 46 G. 3. *c.* 139. § 1. repeals that provision generally, and enacts (§ 3.) that the corn in that state shall not be wetted till nine days, &c. after the 1st of *Aug.* 1806. Then § 14. enacts that *this act* shall commence and take effect, as to all matters whereof no special commencement is thereby provided, from the 1st of *August*, 1806, and shall continue in force till the 25th of *March*, 1807. Held that incorporating the 14th with the 1st section, this law only operated as a repeal of the former one during the time limited in the 14th section; after which the first resumed its operation during the interval between the 25th of *March*, 1807, and a subsequent act reviving and continuing the 46 *G.* 3.

R. v. *Rogers.* 10 E. R. 569

59. Members of volunteer corps enrolled under stat. 42 G. 3. *c.* 66. are entitled to resign on due notification of their intention; not being restrained by the rules of the corps, or its conditions of service; and this liberty is not taken away by stat. 43 G. 3. *c.* 96. which distinguishes between volunteer corps, and volunteers under that act, serving in lieu of the compulsory levy. And the stat. 43 G. 3. *c.* 121. attaches only on corps of volunteers at the time of an actual invasion, and has no retrospective operation on persons having previously resigned.

R. v. *Dowley.* 4 E. R. 512

60. A captain in the militia receiving his pay and contingent allowances, before his qualification was properly authenticated, is not *executing any power* directed by the militia act of the

42 G. 3. *c.* 90. to be executed by captains, so as to bring him within the penalty of the 14th clause; the receipt of such pay and allowances not being provided for by that statute, even if any other than acts of military discipline were intended to be so prohibited,

Robinson v. *Garthewaite.* 9 E. R. 296

61. The statute 42 G. 3. *c.* 90. § 61., enables a magistrate to make an order for payment of servants' wages in certain cases; and directs, that in case of *refusal* or *non-payment* of any sum so ordered for 21 days after such determination, he may issue his warrant of distress; but it gives an appeal to the Sessions; held, that 21 days having elapsed between the making of such order before the appeal, and also 21 days after such appeal dismissed before the warrant of distress issued, the magistrate was warranted in issuing such order of distress without proof of any demand subsequent to the appeal.

Wootton v. *Harvey.* 6 E. R. 75

62. Under the militia acts 42 *G.* 3. *c.* 90: and 47 G. 3. *c.* 7 i., if a person balloted is found at the time of enrollment to be unqualified for the service, and another is balloted in his place out of the same list: this is a continuance of the same ballot, and is a legal ballot.

Astley v. *Ray & al.* 2 W. P. T. 214

63. By the post horse duty act of the 44 G. 3. *c.* 98. schedule B., if the hiring be by the day, and the distance be ascertained; as where the hiring is to go from one certain place to another; the duty is payable by the mile: if the distance be not ascertained, it is then payable by the day; and the post-master letting the horses, and not accounting for the duty accordingly in the stamp-office weekly account, is liable to a penalty of 10*l.*

Sergeaunt v. *White.* 11 E. R. 530

64. If a creditor has both proved his debt under a commission of bankrupt, and commenced an action against the bankrupt before the passing of the stat. 49 G. 3. *c.* 121. § 14., that act does not compel him to relinquish his action. *Atherstone* v. *Huddleston.* 2 W. P. T. 181

STREET.

A waggoner, occupying one side of a public street in a city, before his warehouses, in loading and unloading his waggons for several hours at a time, both day and night, and having one waggon at least usually standing before his warehouses, so that no carriage could pass on that side of the street, and sometimes even foot passengers were incommoded, by cumbrous goods lying on the ground ready for loading, is indictable for a public nuisance; though there were room for two carriages to pass on the opposite side of the street. *R.* v. *Russell.* 6 E. R. 427

SURETY.

1. A contract cannot be carried beyond the strict letter of it, as against a surety. 2 T. R. 360
2. Upon a contract to guarantee a bill for a given sum, the guarantee would not be liable to that extent on a bill given for a larger sum. *Philips* v. *Astlino & al.* 2 W. P. T. 206

T.

TAXES.

1. A house within the limits of an hospital, appropriated to an officer of the hospital for the time being, is not assessable to the land-tax. *Harrison* v. *Bulcock & al. H.* 28 G. 3. 1 H. B. 68
2. Houses built on land embanked from the *Thames* in pursuant of stat. 7 G. 3. *c.* 37. which vests those lands in the owners, free from taxes, are not liable to be assessed to the general land-tax imposed by 27 G. 3., though the latter is conceived in general terms, and is subsequent in point of time to the act creating the exemption. The land-tax acts, though in form annual, being considered, in fact, as permanent.

Williams v. *Pritchard.* 4 T. R 2 (See 8 T. R. 473.)

3. Nor are they liable to be assessed to the rates for paving, &c. of *London*, made under stat. 11 G. 3. *c.* 29.

Eddington v. *Borman.* 4 T. R. 4

4. But occupiers of such houses are not exempted from the payment of the house and window duties imposed by statute 38 G. 3. *c.* 49.

Perchard v. *Heywood.* 8 T. R. 468

5. The owner of stables in *Marybone*, which were rented by the colonel of a troop of horse, for the use of the troop (by the authority of the king), is liable to be assessed for them to the rates made under stat. 10 *G.* 3. *c.* 23. for paving, &c. *Marybone* parish.
Eckersall v. *Briggs.* 4 T. R. 6

6. The Masters in Chancery are not rateable to occupiers of their respective apartments in *Southampton Buildings* under the paving act, 11 *G.* 3. *c.* 22.
Holford v. *Copeland.* 3 B. & P. 129

7. The letting of a horse to hire for the purpose of going upon business from one town to another and back again in the compass of a day's journey, is not a letting to hire for the purpose of *travelling post* within statute 25 *G.* 3. *c.* 51. *R.* v. *A. Tooley.* 3 T. R. 69

8. The words "travelling post" in that act are to be construed according to the popular acceptation of them.
3 T. R. 69

9. A person who lets an horse to hire to carry a *private* express, must take out a licence under that statute.
R. v. *J. Webber.* 3 T. R. 72

10. *Secùs* in the case of a *public* express.
R. v. *J. Cooke.* 3 T. R. 519

11. By stat. 44 *G.* 3. *c.* 98. schedule B., the duty, which before was laid on horses let to hire for *travelling post* by the mile or stage, is there laid on horses let to hire *to travel by the mile or stage:* and persons licensed by schedule A. of that act to let horses to hire to *travel post*, by the mile or stage, must account for the duty according to schedule B. on such lettings to hire as are therein mentioned. But, *quære*, as to lettings to hire *for the day* to go to certain places and back again.
Welsford v. *Todd.* 8 E. R. 580

12. In an action for penalties brought by the farmer of the post-horse tax, on stat. 27 *G.* 3. *c.* 26. (whereby the duties on post-horses leviable under 25 *G.* 3. *c.* 51. were transferred from the king to the farmers of the tax) the offence may be laid to have been committed *with intent to defraud the farmer*, and not his majesty.
Redford q. t. v. *M'Intosh.* 3 T. R. 632

13. If the offence charged be the letting and not accounting for divers, *to wit*, *eight* horses, proof that defendant let and did not account for *five* will support the declaration. 3 T. R. 632

14. The statute requires that the account shall contain the number of horses and miles, and the names of the drivers, but no penalty is inflicted for not inserting *the amount of the duties* received by the post-master: therefore if the declaration only charge that the defendant made *false* accounts, to wit, *by not inserting the amount of duties received*, judgment may be arrested after verdict for the plaintiff.
3 T. R. 632

15. *Semb.* it would not have been sufficient to state generally that the defendant had been guilty of delivering *a false account*, without specifying in what particular. 3 T. R. 632

16. In such an action it is not necessary for the plaintiff to give in evidence his appointment by the lords of the treasury or the commissioners of the stamp duties authorized by them; proof that the defendant has accounted with him *as farmer* for the duties is sufficient.
3 T. R. 632

17. In an action against such farmer for a neglect of duty, it is necessary to aver that he is the farmer appointed under and by virtue of that act; alleging that he is the collector of the rates and duties *recited* in that act, is not sufficient.
Short v. *Pruen.* 6 T. R. 163

18. A person cannot be convicted of a penalty under 25 *G.* 3. *c.* 47. for not delivering to the assessors a list of his horses liable to the duty, &c. "until after the expiration of fourteen days from the time of giving notice by the assessors, and until a demand made by the assessors."
R. v. *Benwell.* 6 T. R. 75

19. The owner of a cart who does not reside within the bills of mortality, or within five miles of *Temple-Bar*, need not enter his name and place of abode with the commissioners of hackney coaches (under stat. 24 *G.* 3. st. 2. *c.* 27. § 8.) or have his name or any number upon the cart, though it be driven within those limits.
R. v. *Powell.* 4 T. R. 572

20. An appeal against a conviction on stat. 24 *G.* 3. stat. 2. *c.* 31. for not entering horses, &c. must be to the quarter sessions next after the *conviction*, and not after the *execution*.
Prosser v. *Hyde.* 1 T. R. 414

21. If a constablewick consist of several hamlets, and two collectors of the duties on houses, &c. are appointed for each hamlet, and the collector or

collectors of any one hamlet fail in duly paying over the money collected, the particular hamlet only where the collector or collectors have failed, is liable to a re-assessment under 20 G. 2. c. 3., and not the whole constablewick.

Barrs v. *Digby*. N. R. 281

TENANT IN COMMON.

A demand of possession by one tenant in common, and a refusal by the other, stating that *he claimed the whole*, is evidence of an actual ouster of his companion. *Doe d. Hellings & Ux.* v. *Bird*. 11 E. R. 49

TENANT IN TAIL.

1. A conveyance by tenant in tail by lease and release, neither bars the issue in tail, nor works a discontinuance: but it passes a base fee, voidable by the issue in tail by entry.

Doe d. Neville v. *Rivers*. 7 T. R. 276

2. *A.* and *B.* being tenants in tail under a devise, *A.* conveys his moiety to *B* in fee, by lease and release, with a covenant to levy a fine; this creates a base fee in *B.*, which estate was afterwards confirmed by the fine, though that was not levied till after the death of the releasee.

Doe d. Gregory v. *Whichelo*. 8 T. R. 211

3. Tenant in tail by lease and release, previous to her marriage conveyed to trustees to the use of herself till the marriage, then to the husband for life, then to herself for life, then to the first and other sons of the marriage, &c.; tenant in tail died before the husband, leaving a son: held that the husband was not entitled to a life-estate either under the settlement, or by the curtesy.

7 T. R. 276.

TENDER.

1. A tender of bank notes is good, unless specially objected to on that account at the time.

Wright v. *Read*. 3 T. R. 554

[See statutes 37 G. 3. c. 45. 91.; and 38 G. 3. c. 1.; and AFFIDAVIT I.]

2. Bank notes are not made a legal tender by the 37 G. 3. c. 45.

Grigby v. *Oakes*. 2 B. & P. 526

3. Where defendant came into possession of goods wrongfully, no tender is necessary of freight, &c. paid by him in order to enable plaintiff to maintain his action.

Longmore v. *Pasley*. 2 T. R. 485

4. If *A.*, *B.*, and *C.* have a joint demand, and *C.* has a separate demand on *D.*, and *D.* offers *A.* to pay him both the debts, which *A.* refuses without objecting to the form of the tender, on account of his being entitled only to the joint demand; *D.* may plead this tender in bar of an action on the joint demand, and should state it as a tender to *A.*, *B.*, and *C.*

Douglas v. *Patrick*. 3 T. R. 683

5. To make a legal tender, there must either be an actual offer of the money produced, or the production of it must be dispensed with by the express declaration or equivalent act of the creditor: Therefore, where the defendant, on departing from home, left 10*l.* with his clerk for the plaintiff; of which the clerk informed the plaintiff when he called and demanded a larger sum; and the plaintiff said he would not receive the 10*l.*, nor any thing less than his whole demand; but *the clerk did not offer* the 10*l.*: this was held to be no tender.

Thomas v. *Evans*. 10 E. R. 101

6. A defendant cannot plead *non assumpsit* as to the whole, and a tender as to part. *Maclellan* v. *Howard*. 4 T. R. 194

7. A defendant in an action on a bond cannot plead *non est factum*, and a tender as to part.

Jenkins v. *Edwards*. 5 T. R. 97

8. It is no answer to a plea of tender before the exhibiting of the plaintiff's bill, that the plaintiff had, before such tender, retained an attorney and instructed him to sue out a *latitat* against the defendant, and that the attorney had accordingly applied, before the tender, for such writ, which was afterwards sued out.

Briggs v. *Calverly*. 8 T. R. 629

9. A plea of tender *after* the day of payment of a bill of exchange, and *before* action brought, is not good; though the defendant aver that he was always ready to to pay from the time of the tender, and that the sum tendered was the *whole money* then due, owing, or payable to the plaintiff in respect of the bill, with interest, from the time of the default, *for the damages* sustained by the plaintiff.

Hume v. *Peploe*. 8 E. R. 168

10. If a writ be returnable in the first return of the term, and the defendant give notice that the debt and costs will be paid before the appearance day, and accordingly tender the debt and costs of the writ before that day, the plaintiff is not entitled to the costs of a declaration, delivered *de bene esse*.

Partington, One, &c. v. *Williams*. 2 N. R. 398

11. Stat. 13 G. 3. *c.* 78. § 27. 29. authorizing surveyors of highways to take and carry materials for repair of highways, making satisfaction for damage done to the land by carrying away the same, to be ascertained in case of dispute by order of justices; and providing that no damages shall be recovered for any trespass, if tender or payment into court of amends be made by defendant; the court of K. B. held that where surveyors had made a new way to carry materials, and after action brought had paid money into court as amends, the sufficiency of such amends could not be questioned at *nisi prius;* but ought to have been ascertained by justices of peace.

Boyfield v. *Porter & al.* 13 E. R. 200

12. But if such new way were made wantonly or unnecessarily, it seems that the plaintiff could not be concluded by such amends tendered or paid into court. 13 E. R. 200

TIME, COMPUTATION OF.

1. Where computation of time is to be made from an act done, the day on which the act is done is to be included in the reckoning.

Castle v. *Burditt.* 3 T. R. 623

2. Therefore, when the law requires that a month's notice of an action be given, the month begins with the day on which the notice is served. 3 T. R. 623

3. And where the statute 21 *Jac.* 1. *c.* 19. § 2. enacts that a trader, lying in prison two months (i. e. lunar months) after an arrest for debt shall be adjudged a bankrupt, that includes the day of the arrest.

Glassington v. *Rawlins.* 3 E. R. 407

4. When the word *month* is used in a statute, without the addition of *calendar*, or any other words to shew that the legislature intended *calendar*, it is understood to mean a lunar month.

Lacon v. *Hooper.* 6 T. R. 224

TITHES.

1. In debt on statute 2 & 3 *Ed.* 6. *c.* 13. for not setting out tithes, where the declaration stated that they were, within forty years next before the statute, *of right yielded and payable* and yielded and paid, evidence that the land had always been remembered to be in pasture, and had never within living memory paid any tithe, is not sufficient to defeat the action.

Mitchell v. *Walker.* 5 T. R. 260

2. But where the declaration only stated that tithe had been yielded and paid forty years before the statute, and there was no evidence of its ever having been paid at all; held that the plaintiff could not recover. *Lord Mansfield* v. *Clerke M.* 9 *G.* 3. *C. B.* 5 T. R. 260. 264, *n.*

3. Evidence, that the parishioners have treated with the proprietor for a composition, is not alone, sufficient to establish his possession of the tithes; in an action on the statute. 1 B. & P. 458

4. Proof that the rector of *A.* had been in constant receipt of tithes for upwards of 30 years arising in another parish is evidence of his right thereto, against a stranger.

Barnes v. *Messinger.* 13 E. R. 251

5. By a grant of all tithes arising out of, or in respect of *farms, lands,* &c. the tithes arising out of, and in respect of rights of common appurtenant to such farms or lands will pass.

Lord Gwydir v. *Foakes.* 7 T. R. 641

6. Hops are by law tithable after they are gathered from the bind; and a custom to set out the tithes by the tenth row, or by the tenth hill, where the rows are unequal, leaving the binds uncut, and the poles standing, cannot supported. *Knight* v. *Halsey.* 7 T. R. 86 [Affirmed in *Dom. Proc.* 19 *June,* 1800, 2 B. & P. 172, *Parl. Ca.* 8vo. vol. 8. App.]

7. At common law grass is titheable in grass cocks, after having been tedded in the process of making it into hay.

Newman v. *Morgan.* 10 E. R. 5

8. The common law mode of tithing hay is in the cocks into which the grass is first collected after cutting and tedding; Although the parson cannot conveniently make his tithe into hay while the parishioner is making his nine parts, without either mixing the whole again, or committing a trespass by treading on the parishioner's hay. The common law mode of tithing wheat is in the sheaf and not in the shock; The parishioner must in all cases leave his nine parts in the field a reasonable time for the parson to compare his tithe with them. *Halliwell (Clk.)* v. *Trappes.* 2 W. P. T. 55

9. Corn is titheable of common right in the sheaf; therefore it is not competent for a farmer, without a custom, before tithing, to put all the sheaves, immediately when bound, into shocks, and then withdrawing the tenth sheaf

from each, to remove the remainder: for the parson has thereby no reasonable opportunity of comparing the tenth with the other nine as he is entitled. *Sallcross* v. *Jowle.* 1 S E. R. 261

10. A custom to pay only a part of the tithe, without substituting any thing else in lieu of the remainder, is bad. 7 T. R. 93

11. But a custom to pay less than the whole tithe may be good, where something in lieu of and as a compensation for the rest is paid 7 T. R. 93

12. In an action on the stat. 2 & 3 *Ed.* 6. *c.* 13. for the treble value of tithe corn omitted to be set out, it is not enough for the defendant to shew the existence, *in fact*, of a custom in the parish to set out the 11th instead of the 10th mow; for the validity, as well as existence of such a custom is properly triable in this form of action, though penal in its nature; being given to the party grieved, and his only remedy at common law for substraction of the tithe due to him.

Phillips v. *Davies.* 8 E. R. 178

13. No evidence is sufficient to support a real composition, unless it have reference to a deed. 2 B. & P. 206

14. If a composition for tithes is made by *A.* as proprietor, and he leases them to *B.* whose interest is afterwards put an end to by *A.* before any alteration is made in the composition, *A.* cannot determine it without six months' notice. *Wyburd* v. *Tuck.* 1 B. & P. 458

15. Where a composition for tithes had been long paid by the farmer, and two years before the action of debt brought on the stat. 2 & 3 *Ed.* 6. *c.* 13. for not setting out the tithes, the vicar, in a conversation with the farmer, demanded his *tithes vicarial;* on which the other tendered him 40*s.* (the annual composition), which the vicar refused to take, but assigned no reason for his refusal; this was held to be no evidence of a notice to determine the composition, which notice ought to be unequivocal; and held also that the farmer, not having denied the vicar's right to tithes in kind before the action brought, was not precluded from taking objection to the action at the trial, for want of a proper notice to determine the composition, analogous to a notice to quit land, by putting the vicar to the strict proof of his right to tithe in kind.

Fell v. *Wilson.* 12 E. R. 83

16. Compositions for tithes cease on the death of the incumbent with whom they were made, at least as to his successor; but if the successor continue to receive the next payment due after the death of his predecessor, he can only be accountable to the executors for such portion of it as the value of the tithes, if paid in kind, accruing due between the last composition received by the late incumbent and his death, would have amounted to, and not *pro ratâ*, according to the time which had run before his death from the last payment. *Williams & al.* v. *Powell (Clk.)* 10 E. R. 269

17. If *A.* execute a lease of tithes to *B.* on a day subsequent to their severance, but previous to their being carried away by the landholder, *B.* cannot maintain an action on 2 & 3 *Ed.* 6. *c.* 13; as the right to the tithe vested in *A.* immediately on the severance. 1 B. & P. 458, *n.*

18. Though the proprietor of tithes leave them on the land more than a reasonable time after they are set out, and after he has notice thereof, the owner of the land cannot justify in trespass turning in his cattle upon the land to depasture it in the usual course of husbandry, whereby the cattle consumed the tithes; but his remedy is either by distress of the tithes *as damage feasant*, or by action.

Williams v. *Ladner.* 8 T. R. 72

19. Due notices having been given to the parson of the setting out the tithes of fruit and vegetables in a garden; which were accordingly set out on the days specified; and the tithes not having been removed at the distance of a month afterwards, when they had become rotten; a notice then given by the owner, to remove the tithed fruits and vegetables within two days, otherwise an action would be commenced against the parson, is sufficient notice of their having been set out, whereon to found an action, if they be not removed. And due notices having been given of setting out tithes of garden vegetables and field barley, on certain days between the 11th and 16th of *September*, a general notice on the 17th to the parson, to take away *all the tithes of* plaintiff's *lands* within two days, is sufficient whereon to found the like action.

Kemp v. *Filewood (Clk.)* 11 E. R. 358

20. Though by the general rule a farmer may not at his pleasure tithe and carry *part* of a field of corn which has been cut, before *the whole be tithed*, and then proceed to another field, &c. so as to oblige the parson to come again to the same field at another time to take his tithe; which general rule, however, being levelled against fraud, vexation, and caprice, must, where these have no application, be understood with all necessary exceptions of partial ripeness and weather, the neglect of which would be prejudicial to the crop; yet there is no rule of law which obliges a farmer (all fraud and vexation apart) to tithe the whole of that part of a field which lies in one parish before he proceeds to tithe any part of the same field lying in another parish. And therefore, where a farmer cut the whole of a field lying in two parishes and after cocking) and tithing part in one, proceeded to cock and tithe part in the other, and the weather being catching, carried that part which was tithed, the day before the rest of the field; held that this being done *bonâ fide* was lawful.
Leathes, (*Clk.*) v. *Levinson*. 12E.R.239

21. In debt for substraction of tithes of any particular article, the plaintiff, though he alledge the tithe of that article to have been "granted, yielded, and paid, and of right due and payable," on the land in question 40 years next before the making of the stat. of *Ed.* 6, need not prove that the particular article was cultivated there at that time; but it lies on the defendant to prove that it was not.
Hallewell (*Clk.*) v. *Trapps*. 2 N.R. 173

22. A parson is not entitled to carry his tithes home by every road which the farmer himself uses for the occupation of his farm.
Cobb (*Clk.*) v. *Selby*. 2 N. R. 466

TOLL.

1. A general *indebitatus assumpsit* will lie for tolls.
Seward v. *Baker*. 1 T. R. 616

2. If the grantee of a market under letters patent from the crown, suffer another to erect a market in his neighbourhood and use it for the space of 23 years without interruption; he is by such use barred of his action on the case for disturbance of his market.
Holcroft v. *Heel*, 1 B. & P. 400

8. If a person claiming a toll for passing over an highway, can shew that the liberty of passing over the soil, and the taking of toll for such passage, are both immemorial, and that the soil and the tolls were, before the time of legal memory, in the same hands, though severed since, it will be presumed that the soil was originally granted to the public in consideration of the tolls; and such original grant is a good consideration to support the demand.
Ld. Pelham v. *Pickersgill*. 1T.R.660

4. In a turnpike act, imposing tolls on horses, &c. "cattle going to, or returning from pasture," and "horses attending cattle returning from pasture," were exempted; it was held that a horse ridden by the owner of the cattle at pasture in order to fetch them from pasture, did not come within either of the exceptions.
Harrison v. *Brough* 6 T. R. 706

5. *British* ships, in passing by the *Eddystone* and other light-houses in the channel, sailing from foreign port to foreign port, and not touching at any place in *Great Britain* and *Ireland*, are not liable to pay the lighthouse duties to the Trinity-House, under statutes 4 *Anne* c. 20. and 8 *Anne* c. 17.
Trinity-House v. *Sorsbie*. 3 T. R. 768

6. The Court of C. P. on a trial at bar, held, that the writ *de essendo quietum de theolonio* is not merely prohibitory, but remedial, on which the parties may plead to issue, on a question of right. And that freemen of the city of *London* have a right to be exempt from the payment of all tolls and port duties throughout *England* (except the prisage of wines), in whatever place they reside, and though they have obtained their freedom by purchase. *London (Corp.)* v. *King's Lynn (Corp.)*
1 H. B. 206

7. This judgment was reversed in the Court of K. B., that court holding that an action would not lie on this writ, until the plaintiff's goods were distrained for toll. 4 T. R. 130

8. But this latter judgment was reversed in *Dom. Proc.* upon the ground, that though toll be merely *claimed* of the individual members of a corporation exempt from toll, an action will lie on this writ in the name of the corporation. *Dom. Proc. May* 2d, 1796; 6 T. R. 778: 1 B. & P. 487: (and see PARL. CASES, 8vo. vii. tit. TOLL.)

9. The question as to the right of exemption claimed on behalf of *non-resident* freemen was not determined. It seems that they have not any such right. See *London (Corp.)* v. *Liverpool (Corp.)* 1 B. & P. 522, *n.*

10. Whether a right to take toll on goods sold by sample in a market can be supported? *Qu.* (See EVIDENCE III. 2, 3.) 4 T. R. 107

11. Whether if no specific toll be granted, the grantee of a market be entitled to any toll: and whether in any case, he can support any action for an injury to his market? 1 B. & P. 400

12. Where it appeared in evidence upon an action *indebitatus assumpsit* for toll that a corporation were entitled by a general grant of toll, explained by usage to be due for all commercial goods passing in and out of their city, on horses, or in carts, or waggons, (that is, at the rate of 1*d.* for every horse-load, and 2*d.* for every cart-load drawn by one horse, and 2*d.* more for each additional horse); held that any alteration of the carriage by which the goods were so conveyed, as by taking them in stage coaches, instead of carts or waggons, could not vary the right of toll in the proportion of 2*d.* for each horse drawing the coach, although the number of horses were estimated by the weight of passengers rather than of goods. *Carlisle (Mayor)* v. *Wilson.* 5 E. R. 2

13. Where the corporation of *Worcester* had for above forty years received toll upon corn sold in their market *by sample*, and *afterwards* brought within the city to be delivered to the buyer, and for about 60 years back, as far as living memory went, when corn pitched in the market place on one market day was not then sold it was usually put in store in the city and only one bag brought into the next market for a sample, and when sold in that manner toll used to be taken on the whole: this was held to be sufficient evidence to be left to the jury of a prescriptive claim to take toll on corn sold in the market by sample, and afterwards brought into the city to be delivered to the buyer: though the witnesses spoke according to their recollection and belief of the commencement of selling by sample in the market in the manner now practised between forty and fifty years ago.
Hill v. *Smith.* 10 E. R. 476

14. The seller of corn by sample in a market is benefited by the market as well as the seller of corn which is pitched there in bulk and sold; and if he refuses to pay the same toll which is paid by the seller of corn in bulk, an action on the case lies against him for the injury done to the market in selling by sample. The burgage tenants in Tewkesbury are not exempt from payment of toll in the market there. If the grantee of a royal franchise, as toll, grant an immunity thereout and the franchise of toll afterwards become extinct by unity of possession in the crown the immunity does not thereby cease; and if the crown regrants the toll, the grantee must take it still subject to the immunity.
Bailiffs, &c. of Tewkesbury v. *Bricknell.* 2 W. P. T. 120

15. An action on the case by the owners of a market, who had a prescriptive right of toll on all corn *brought into the market* to be sold, and there sold; alleging that the defendant intending to deprive them of their toll *fraudulently* bought corn *in the market by sample*, knowing that the commodity was not there in bulk at the time of the sale, whereby the plaintiffs were prevented from taking their toll; is not sustained by evidence of the mere fact of such purchase by sample in the market, though with knowledge of the plaintiffs' claim of toll, coupled with the fact of not paying the toll on demand afterwards when the corn was delivered to the defendant in the same borough but *out of the market*; for *non constat* that the corn would otherwise have been brought into the market, or that the defendant did any act to induce the owner of it not to bring it there in the first instance. Neither will the fact of such purchase by sample in the market, though coupled with the subsequent delivery out of the market, sustain a count for toll as for corn *brought into the market, and there sold. The Bailiffs, &c. of Tewkesbury* v. *Diston.* 6 E. R. 438

16. Toll-gate keepers sued for acts done under statute 25 *G.* 3. *c.* 51. need not be sued in the county where the fact was comitted, as they must be under statute 13 *G.* 3. *c.* 78. § 81.
Basing v. *Skelton.* 5 T. R. 16

17. A collector or renter of turnpike tolls, though illegally appointed, without the forms prescribed by act of

parliament, may still recover, upon a count for an account stated, the amount of the tolls for which he had credited the defendant passing through the gate; no objection being made to the plaintiff's title by the trustees or creditors of the turnpike. And the plaintiff having sent to the defendant an account of the tolls due, who not long after sent 5*l.* inclosed in a letter to the plaintiff, in which he stated that she should have *the remainder* next week, is evidence of such an account stated, and a recognition of the plaintiff's title to be accounted with for the tolls. *Peacock* v. *Harris.* 10E.R.104

TRADE.

1. How far trading with an enemy is illegal in a subject? *Qu.*
Gist v. *Mason.* 1 T. R. 84
2. By the maritime law it is cause of confiscation in a subject, provided he is taken in the act, but it does not extend to a neutral vessel. 1 T. R. 84
3. Trade is not transmissible, but is put an end to by the death of the trader.
Barker v. *Parker.* 1 T. R. 295
4. A licence to export goods to certain places within the influence of the enemy interdicted to *British* commerce, granted to *H. N.* on behalf of himself *and other British* merchants, &c. is sufficient to legalize an insurance on such an adventure, if it appear that *H. N.* was the agent employed by the *British* merchants really interested in it to get the licence, though he had no property in the goods himself.
Rawlinson & al. v. *Janson.* 12E.R.223

TREASON.

1. On indictment for high treason in sending intelligence to the enemy, a letter sent by one of the conspirators in pursuance of the common design, with a view of reaching the enemy, is evidence against all engaged in the same conspiracy.
R. v. *W. Stone.* 6 T. R. 527
2. Any intelligence sent to the enemy in order to serve them in shaping their attack or defence, though its object be to dissuade them from an invasion, is high treason.
R. v. *W. Stone.* 6 T. R. 529
3. A commitment for *treasonable practice* is legal.
R. v. *Despard.* 7 T. R. 736

TRESPASS.

I. *In what cases maintainable.*

1. To entitle a man to bring trespass, he must, *at the time* when the act was done which constitutes the trespass, either have the *actual possession* in him of the thing which is the object of the trespass, or else he must have a *constructive possession* in respect of the right being actually vested in him, as in the case of an estray or wreck *before* seizure by the lord.
Smith v. *Milles.* 1 T. R. 480
2. An executor's right is derived from the will, the probate is only evidence of it; therefore he has a constructive possession from the testator's death.
1 T. R. 480
3. A femme covert, though deserted by her husband, who had gone abroad, trading as a femme sole, cannot maintain trespass for breaking and entering *her* dwelling-house.
Boggett v. *Frier.* 11 E. R. 301
4. *A.* having let his house ready furnished to *B.* cannot maintain *trespass* against the sheriff for taking the furniture under an execution against *B.* though notice were given that the goods belonged to *A.*; because trespass is founded on a *tort* done to the possession, which was not in *A.*, at the time. *Ward* v. *Macauley.* 4 T. R. 489
5. *A.* demised to *B.* the milk of twenty-two cows to be provided by *A.*, and to be fed at *A.*'s expense on certain closes belonging to *A.*; *A.* covenanting that *B.* might turn out a mare, and that no other cattle should be fed there: held that the separate herbage and feeding of those closes passed to *B.*, and that *B.* might distrain other cattle of *A.* doing damage there.
Burt v. *More.* 5 T. R. 329
6. In such case, *B.* might maintain trespass against strangers. 5 T. R. 333
7. Where a person has *vesturum terræ*, or *herbagium terræ*, he may maintain trespass *quare clausum fregit.*
5 T. R. 335
8. One who has contracted with the owner of a close for the purchase of a growing crop of grass there, for the purpose of being mown and made into hay by the vendee, has such an exclusive possession of the close, though for a limited purpose, that he may maintain trespass *qu. cl. fregit* against any person entering the close and tak-

ing the grass, even with the assent of the the owner.

Crosby v, *Wadsworth*. 6 E. R. 602

9. If two persons are possessed of adjoining closes, neither being under any obligation to fence, each must take care that his cattle do not enter the land of the other. But if two persons have the concurrent possession of land for the purpose that each may take profits of a special nature, and distinct from, but not inconsistent with, the right of the other, whether either one is bound to guard against casual damage, which during, and by the fair enjoyment of his right, may happen to the other, *quære*. *Semb. Churchill* v. *Evans*. 1 W. P. T. 529

10. But clearly the one cannot distrain the cattle of the other damage feasant.

Per Cur. 1 W. P. T. 529

11. Trespass will not lie in this country for entering a house in *Canada*, because the cause of action is local.

Doulson v. *Matthews*. 4 T. R. 503

12. Trespass lies, and not case, for working an estray, although the original taking be admitted to be lawful.

Oxley v. *Watts*. 1 T R. 12

13. An action of trespass cannot be maintained against the owner of one vessel for damage done to another by the negligence of the pilot while the owner is on board. The proper remedy is by an action on the case.

Hugget v. *Montgomery*. 2 N. R. 446

14. If one of a ship's crew does a wilful act of injury to another ship without, any direction from or privity of the master, trespass cannot be maintained against the master, although he was on board at the time.

Boucher v. *Noistrom*. 1. W. P. T. 568

15. But the master of a ship is not discharged of his responsibility for the acts of his crew, although done under the direction of a pilot, who by the regulations of a statute supersedes the master for the time in the government of the ship. 1 W. P. T. 568

16. Officers doing their duty shall not be trespassers by relation. 1 T. R. 480, 1

17. A sheriff or his officers shall not be trespassers by relation, if the first taking were lawful. 1 T. R. 480, 1

18. Trespass does not lie against excise officers who enter into a person's house by virtue of a legal warrant to search for smuggled goods, although none such be found therein. But case lies for maliciously obtaining or executing the warrant. *Cooper* v. *Boot*, (*in error*).

M. 25 *Geo.* 3. 1 T. R. 535. *n.*

19. Trespass lies against the searchers of leather (appointed by stat. 2 *Jac.* 1. *c.* 22.,) for seizing leather sufficiently dried, in order to carry it before other officers called triers, though in their judgment it is insufficiently dried.

Warne, v. *Varley*. 6 T. R. 443

20. Trespass lies against a landlord, who on making a distress for rent turned the plaintiff's family out of possession, and kept the premises on which he had impounded the distress.

Etherton v. *Popplewell*. 1 E. R. 139

21. Where one, who entered under a warrant of distress for rent in arrear, continued in possession of the goods upon the premises for 15 days, during the last four of which he was removing the goods, which were afterwards sold under the distress; the court of K. B. held that at any rate he was liable in trespass *quare clausum fregit* for continuing on the premises and disturbing the plaintiff in the possession of his house, after the time allowed by law.

Winterbourne v. *Morgan*. 11 E. R. 395

22. Where a justice of the peace maliciously grants a warrant against another without any information laid before him, upon a supposed charge of felony, the remedy against the justice, is trespass and not case.

Morgan v. *Hughes*. 2 T. R. 225

23. Trespass lies not against magistrates acting upon a complaint made to them on oath, by the terms of which they have jurisdiction; though the real facts of the case might not have supported such complaint; if such facts were not laid before them at the time by the party complained against, having notice of such complaint, and being properly summoned to attend.

Lowther v. *Radnor* (*Earl*). 8 E. R. 113

24. If a magistrate's warrant be shewn by the constable who has the execution of it, to the person charged with an offence, and he thereupon, without compulsion, attend the constable to the magistrate, and after examination be dismissed, it seems this is not such an arrest as will support trespass and false imprisonment. *Arrowsmith* v. *Le Mesurier*. 2 N. R. 211

25. If *A*., having been robbed, suspect *B*., to be guilty, and take him and deliver him into the charge of a con-

stable present; *B.*, if innocent, may maintain trespass against *A.*

Stonehouse v. *Elliott.* 6 T. R. 315

26. After an acquittal of the defendant upon an indictment for a felonious assault upon the plaintiff by stabbing him, the plaintiff may maintain trespass to recover damages for the civil injury, if he be not shewn to have colluded in procuring such acquittal.

Crosby v. *Leng.* 12 E. R. 409

27. An indictment will not lie for conspiring to commit a civil trespass upon property (snaring hares in a preserve), though alledged to be done in the night by persons armed with offensive weapons to resist any persons opposing them. *R.* v. *Turner & al.* 13 E. R. 228

28. A father may maintain trespass for breaking, &c. his house, and debauching his daughter, *per quod servitium amisit*, though the daughter be above 21 years of age, where acts of service are proved, though there be no contract for service. *Bennet* v. *Alcott.* 2 T. R. 166

29. Where this kind of offence is accompanied with an illegal entry of the father's house, he has his election either to bring trespass for the breaking, &c. and lay the debauching of the daughter and loss of her service as consequential; or he may bring the action on the case merely for debauching the daughter, *per quod servitium amisit.*

2 T. R. 166

30. Licence to enter the plaintiff's house, if pleaded, is a bar to the former action; but it cannot be given in evidence under the general issue.

2 T. R. 166

31. One in possession of glebe land under a lease void by the statute 13 *Eliz. c.* 20. by reason of the rector's non-residence, may yet maintain trespass upon his possession against a wrong doer. *Graham* v. *Peat.* 1 E. R. 244

II. *Justification: what shall be, and how to be pleaded.*

1. In trespass the defendant may in all cases give evidence of title under the general issue.

Dodd v. *Kyffin.* 7 T. R. 354

Argent v. *Durant.* 8 T. R. 403

2. In justifying the use of a crane in a public quay, it is sufficient to say, that "it is a public and open lawful quay," without claiming the right by immemorial usage.

Bolt v. *Stennett.* 8 T. R. 606

3. The public have a right to use the cranes erected on public quays paying the *customary compensation.* 8 T. R. 606

4. A person may justify a trespass in following a fox with hounds over the grounds of another, if he does no more than is necessary to kill the fox, because they are noisome animals.

Gundry v. *Feltham.* 1 T. R. 334;—(and see *Nicholas* v. *Badger*, 37 & 38 *Elis. C. B.* 3 T. R. 259, *n.*)

5. A private person may justify breaking and entering the house of another, and imprisoning his person, in order to prevent him from committing murder on his wife.

Hancock v. *Baker.* 2 B. & P. 260

6. In trespass for breaking and entering the plaintiff's close and taking his goods, the defendant may justify under a sufficient legal process if he had it in fact at the time, though he declared then, that he entered for another cause.

Crowther v. *Ramsbottom.* 7 T. R. 654

7. In an action for breaking and entering the plaintiff's house, a sheriff's officer cannot justify having entered under a writ of *quare clausum fregit*, and contituing till he received a sum of money as and by way of surety for the plaintiff's appearance under that writ.

Moore v. *Beamont.* 6 T. R. 137

8. *Qu.*—If the officer can attach the defendant's goods or money under such a writ? 7 T. R. 137

9. *Semb.*, that a sheriff's officer acting under civil process, may justify breaking the inner doors of the defendant's house, though he be not therein at the time. *Ratcliffe* v. *Burton.* 3 B. & P. 223

10. But in such case he must first demand admittance. *ib.*

11. A justification, by bail above, for breaking and entering the house of *A.* the outer door being open, in which the principal resides, in order to seek for him, for the purpose of rendering him, is good, without averring that the principal was in the house at the time.

Sheers v. *Brooks.* 2 H. B. 120

12. And in such a plea an averment that the defendants "duly became bail and "entered into a recognizance," is sufficient; without stating that the principal was delivered to their custody.

2 H. B. 120

13. A plea of justification by an officer (to trespass for taking the goods of *A. B.*) that he took them under a distringuas against *C. B.* (meaning the said *A. B.*) to compel an appearance,

cannot be supported; though it be averred that *A. B.* and *C. B.* are the same person, unless *A. B.* appeared in that action, and omitted to plead the misnomer in abatement. If he did appear in that action, and omitted to plead in abatement, he is concluded by it. *Cole* v. *Hindson.* 6 T. R. 234

14. A defendant in an action of trespass for false imprisonment, pleading a justification under *mesne process* sued out by him in a cause in which he was plaintiff, may state that the writ issued upon an affidavit to hold to bail, without setting forth the cause of action: for if a party be arrested maliciously and without any cause of action, his remedy is by an action for maliciously holding him to bail.

Belk v. *Broadbenk.* 3 T. R. 183

15. In pleading the taking of a term under a *fi. fa.* it is sufficient to state that the party was possessed of *a certain interest in the residue of a certain term of years.* 3 T. R. 297

16. In trespass for breaking and entering the plaintiff's house, and expelling him therefrom, the breaking and entering are the gist of the action, and the expulsion is merely aggravation; therefore a justification as to the breaking and entering will cover the whole declaration.

Taylor v. *Cole.* 3 T. R. 292

17. If the plaintiff mean to insist on the expulsion, as making the defendant a trespasser *ab initio*, he should new assign it. 3 T. R. 292;—(Affirmed in *Cam. Scac.*) 1 H. B. 555

18. The second count in trespass (being a general one) does not always avoid the necessity of a new assignment: it is added in order to avoid the locality. But there cannot be a new assignment except where there is a general plea; and if the case be such that, on a special plea the plaintiff may be driven to a new assignment, he may give the matter in evidence under the second count on not guilty. *Smith & al.*

Aesignees v. *Milles.* 1 T. R. 479

19. Where a declaration for false imprisonment against *A.* and *B.* contained two counts, to both of which the defendants pleaded not guilty, and justified the first under mesne process, *A.* as the plaintiff in that action, and *B.* as the bailiff; and the plaintiff by a new assignment, admitting the arrest to be lawful, replied that *B.*, with the consent of *A.*, voluntarily released him, and that they afterwards imprisoned him for the time mentioned in the first count; the plaintiff having failed in proving the new assignment, by not shewing the consent of *A.*, shall not be permitted to prove the same trespass against *B.* under the other count.

Atkinson v. *Matteson.* 2 T. R. 172

20. Where the plaintiff complains of a single act of trespass in each count, each of which is justified by the defendant in his several pleas, the plaintiff cannot in his replication take issue upon the facts of such justification, and also newly assign either the same or different matters; such replication and new assignment being double.

Cheasley v. *Barnes & al.* 10 E. R. 73

21. And the objection is sufficiently pointed at by assigning as special cause of demurrer, that each plea containing a distinct justification to the *single* act of trespass alleged in breaking and entering the plaintiff's close in the first count, &c. the plaintiff had by his replications *and new assignment* attempted to put in issue several distinct acts of trespass in breaking and entering the same close, &c. 10 E. R. 73

22. A sheriff justifying in trespass, under a writ of *fieri facias*, need not shew its return: the distinction being in this respect between a justification under mesne process, and under process in execution; at least where in the latter case no ulterior process is necessary to complete the justification. 10 E. R. 73

23. Upon a plea of *liberum tenementum*, the defendant has the choice to what parcels he will apply his plea, and if the plaintiff insists upon a trespass in other parcels he must newly assign.

Hawke v. *Bacon.* 2 W. P. T. 156

24. If to an action of trespass for pulling down and carrying away a gate the defendant plead a right of way, and that the gate being wrongfully erected across the same, he took it down and deposited it in a convenient place *for the use of the plaintiff*, to which the plaintiff replies a subsequent conversion; proof that the defendant put the gate upon his own premises, from whence the plaintiff might have taken it if he had pleased, will not sustain the replication.

Houghton v. *Butler.* 4 T. R. 364

25. Where the plaintiff had lands abutting on one side of a public highway called *Shepherd's Lane*, (which is *primâ facie* evidence that the nearest half of the lane was his soil and freehold), he may declare generally for a trespass in his close called *Shepherd's Lane;* and the defendant must plead soil and freehold in another, in order to drive the plaintiff to new assign the trespass complained of in the part of the lane which was his exclusive property.

Stevens v. *Whistler.* 11 E. R. 51

26. A defendant, in trespass, cannot justify, under the general issue, the cutting the posts and rails of the plaintiff, though erected upon the defendant's own land; there being no question raised as to the property remaining in the plaintiff.

Welch v. *Nash.* 8 E. R. 394

27. To trespass for breaking and entering &c. and pulling down and taking away certain buildings, &c. The defendant as to the breaking and entering suffered judgment by default, and pleaded not guilty as to the rest.—Held that such plea was sustained by shewing that the building taken away, which was of wood, was erected by him as tenant of the premises on a foundation of brick, for the purpose of carrying on his trade, and that he still continued in possession of the premises at the time when, &c. though the term was then expired.

Penton v. *Robart.* 2 E. R. 88

28. To trespass for an assault and battery the defendant may plead that the plaintiff, with force and arms, and with a strong hand endeavoured forcibly to break and enter the plaintiff's close; whereupon the defendant "did then and there resist and oppose such entrance, and did then and there defend his possession as it was lawful for him to do;" and if any damage happened to plaintiff it was in the defence of the possession of the said close.

Weaver v. *Bush.* 8 T. R. 78

29. A plea of *molliter manus imposuit* in orner to turn the plaintiff out of the defendant's house, where she continued against his will, ts no answer to a charge against the defendant for stiking the plaintiff repeated blows, and with great force and violence several times knocking her down.

Gregory & Ux. v. *Hill.* 8 T. R. 299

30. To a declaration for several trespasses on the plaintiff's land, on divers days, &c. the plea alleged, that at the said several days, &c. the defendant committed the said several trespasses by licence of the plaintiff: and the latter replied that the defendant of his own wrong, and *without the cause* alledged, committed the said several trespasses, &c.: held that evidence of a licence which covered *some*, but *not all*, of the trespasses proved, within the period laid in the declaratiou, did not sustain the justification upon the issue taken by the replication.

Barnes v. *Hunt.* 11 E. R. 451

31. To an action of trespass, for killing the plaintiff's dog, defendant cannot justify the act, by stating that the lord of the manor was possessed of a close, and that the defendant, as his gamekeeper, killed the dog when running after hares in that close, for the preservation of the hares; such plea not even stating that it was *necessary* to kill the dog for the preservation of the hares; not stating that it was the dog of an unqualified person.

Vere v. *Lord Cawdor.* 11 E. R. 568

III. *Verdict, &c. in.*

1. *Qu.*—Whether, in an action of trespass for assaulting and beating the plaintiff's niece, *per quod servitium amisit*, the jury can take into their consideration the injury sustained by the niece herself, in having been deflowered.

Edmonson v. *Machell.* 2 T. R. 4

2. In these actions the court will not readily grant a new trial on account of excessive damages. 2 T. R. 166

0. In trespass for assault and battery and not guilty pleaded, the jury are not at liberty to take into consideration the circumstances of the assault and battery with a view to reduce the verdict below the amount of the damage actually sustained, if those circumstances could have been pleaded.

Watson v. *Christie.* 2 B. & P. 224

4. Where the defendant justified, in trespass, under a custom which was bad in law, and the issue on it was found for him, the court set aside the verdict on that issue, and entered a verdict for the plaintiff with nominal damages.

Selby v. *Robinson.* 2 T. R. 758

5. If a declaration in trespass contain two counts, and the defendant plead to one, and suffer judgment by default on another, and on trial of the first the plaintiff only prove one act of trespass which is covered by the second count, he is not entitled to a verdict on the first count.

Lee Compere v. *Hicks.* 7 T. R. 727

6. Under certain circumstances the court will stay the proceedings in an action of trespass for seizing goods, on the defendant's restoring the goods, or paying the full value of them, with the costs of the action.

Pickering v. *Truste.* 7 T. R. 58

7. Claim of conuzance made by the vice-chancellor of the University of *Oxford*, in the vacancy of the office of chancellor by death, on behalf of the University, allowed in a plea of trespass.

Williams v. *Brickenden.* 11 E. R. 543

TROVER.

1. None shall be held to special bail in action of trover or detinue without a judge's order. *Reg. Gen.* K. B. & C. P. *Hil.* 48 *G.* 3. 9 E. R. 325
1 W. P. T. 203

2. *Trover* must be founded in the property of the plaintiff. 1 T. R. 56

3. And he must have the right of possession as well as of property.

Gordon v. *Harper.* 7 T. R. 9

4. Therefore where furniture, which had been leased with the house was wrongfully taken in execution by the sheriff, it was ruled that the landlord could not maintain trover pending the lease. 7 T. R. 9

5. A plaintiff who is entitled to the temporary possession of a chattel, and delivers it back to the owner for an especial purpose, may after that purpose is satisfied, and during his temporary right, maintain trover for it against the owner.

Roberts v. *Wyatt.* 2 W. P. T. 268

6. A trader on the eve of bankruptcy makes a collusive sale of his goods to *A.*, the assignees cannot maintain trover for them against *A.*, without proving a demand and refusal.

Nixon v. *Jenkins.* 2 H. B. 135

7. Where the owner of goods on board a vessel directed the captain not to land them on the wharf, against which the vessel was moored, which he promised not to do, but afterwards, delivered them to the wharfinger for the owner's use, under the idea of the wharfinger's having a lien thereon for the wharfage fees, because the vessel was unloaded against the wharf; held that the owner upon demand and denial might maintain trover against the captain, unless the latter could establish the wharfinger's right.

Syeds v. *Hay.* 4 T. R. 260

8. *A.* entrusted *B.* with goods to sell in *India*, agreeing to take back from *B.* what he should not be able to sell, and allowing him what he should obtain beyond a certain price, with liberty to sell them for what he could get, if he could not obtain that price. *B.* not being able to sell the goods in *India* himself, left them with an agent to be disposed of by him, directing the agent to remit the money to him (*B.*) in *England*. Held that *A.* could not maintain trover against *B.* for the goods.

Bromley v. *Coxwell.* 2 B. & P. 438

9. And it seems that he could not maintain any action. *ib.*

10. If *A.* indorse a bill, drawn in his favour and accepted, to *B.* in order that he may raise money for *A.* by negociating it, and *B.* gives it to *C.*, who puts it into the hands of *D.* without consideration, two years after the bill is due, *A.* may recover back the bill from *D.* in trover.

Goggerley v. *Cuthbert.* 2 N. R. 170

11. An action of trover cannot be maintained by a tenant in tail expectant on the determination of an estate for life, without impeachment of waste, for timber which grew upon and was severed from the estate.

Pyne v. *Dor.* 1 T. R. 55

12. Certain lands, together with the woods, &c. were conveyed under a marriage settlement to *A.* and *B.* their heirs and assigns during the life of *S. W.* in trust, to pay the rents and profits, as the said *S. W.* should appoint, during her life; and after her decease, to the use of such child or children of the marriage, and in such shares as the said *S. W.* should appoint; and for want of appointment to the use of the children equally; &c. and the heirs of their bodies, with cross remainders; and in default of such issue, to the use of the right heirs of *S. W.* for ever; held, that *A.* and *B.* could not maintain trover against the defendant, a stranger, for certain trees which had been cut down by the order of the husband of *S. W.*, and carried away by the defendant.

Blake v. *Anscombe,* N. R. 25

13. A member of an amicable society, intrusted with a box containing the fund, and bound by bond to keep it safely, cannot maintain trover against another member and a third person, who take it from him.

Holliday v. *Camsell.* 1 T. R. 658

14. An uncertificated bankrupt may maintain trover for goods acquired by him since his bankruptcy, as against all the world but his assignees.

Webb v. *Fox.* 7 T. R. 391

15. Where a ship was mortgaged at sea, with a proviso that the mortagor should continue in possession till failure of payment of the mortgage money on demand, but the grand bill of sale was delivered, and the mortgagor became bankrupt before the arrival the ship, and the mortgagee took possession on her arrival; he may maintain trover against the assignees who took the ship from him, notwithstanding he made no demand either on the bankrupt or his assigness.

Atkinson v. *Maling.* 2 T. R. 462

16. A sale of a ship (which was afterwards lost at sea), made by the defendant, who claimed under a defective conveyance from a trader before his bankrnptcy, is a sufficient conversion to enable the assignees of the bankrupt to maintain trover, without shewing a demand and refusal.

Bloxam & al. (*Assignees*) v. *Hubbard.* 5 E. R. 407

17. *Semble*, that a sale of the whole of a ship by one who is only a part-owner, in exclusion of the right of another who is tenant in common with him, is not equivalent to the *destruction* of the subject-matter mediately or immediately, so as to enable his co-tenant to maintain trover against him for it.

Heath v. *Hubburd.* 4 E. R. 110

18. But if the subject-matter be actually destroyed by one tenant in common, trover will lie against him by his co-tenant. And where it appeared that one tenant in common forcibly took a ship out of another's possession, and secreted it from him, so that he knew not where it was carried, and changed the name of it, and it afterwards got into a third person's hands, who sent it on a foreign voyage where it was lost, Lord C. J. *King* left it to the jury, whether under the circumstances the destruction was not by the defendant's (the tenant in common's) means: and the jury finding in the affirmative, the court, on motion for a new trial, approved of the Chief Justice's direction, and refused to set aside the verdict. *Barnardiston* v. *Chapman. H. 7. G. 1. C. B.* Lord *King's* MS. (cited.) 4 E. R. 121

19. One tenant in common of a chattel cannot maintain trover for it against his companion, unless the latter have so disposed of it, as to render it impossible that the plaintiff should ever take and use it.

Fennings, v. *Grenville.* 1 W. P. T. 241

20. The conversion of a chattel by a tenant in common to its general and profitable application, though it change the form of the substance, is not such a destruction of the subject-matter, as to prevent the plaintiff from taking and using it in its altered state; therefore it creates no right of action. 1 W. P. T. 241

21. Trover and not trespass lies by the assignees of a bankrupt against a sheriff, for taking the goods of the bankrupt in execution after an act of bankruptcy, though before the issuing of the commission, where he sells them after the issuing of the commission, &c. and has notice from the provisional assignee not to sell. *Smith & al.* (*Assignees*) v. *Milles.* 1 T. R. 475

22. Where defendant came into possession of goods wrongfully, no tender is necessary for the amount of freight, &c. paid by him, to enable the plaintiff to maintain his action of trover.

Lempriere v. *Pasley.* 2 T. R. 485

23. If goods be obtained from *A.* by fraud, and pawned to *B.* without notice, and *A.* prosecute the offender to conviction, and get possession of his goods, *B.* may maintain trover for them: for this is distinguishable from the case of felony, where the owner's right of restitution is given by positive statute. (21 *H.* 8. c. 11.)

Parker v. *Patrick.* 5 T. R. 175

24. Trover will not lie for goods *irregularly sold* under a distress; the statute 11 *G.* 2. c. 19. § 19. having declared that the party selling should not be deemed a trespasser *ab initio;* and having given an action on the case to the party grieved by such sale.

Wallace v. *King.* 1 H. B. 13

25. But, if a party pay money in order to redeem his goods from a wrongful distress for rent, he may maintain trover against the wrong-doer.

Shipwick v. *Blanchard.* 6 T. R. 298

26. Taking the property of another, by assignment from one who had no authority to dispose of it; as taking an assignment of tobacco in the king's warehouse, by way of pledge from a broker who had purchased it there, in his own name for his principal; and refusing to deliver it to the principal, after notice, and demand by him; none other than the person in whose name it is warehoused being able to take it out; is a conversion.

M'Combie v. *Davis.* 6 E. R. 538

27. Under a contract of sale whereby the vendee agreed to purchase all the starch of the vendor then lying at the warehouse of a third person, at so much *per* cwt. by bill at two months; which starch was in papers, but the exact weight not then ascertained, but was to be ascertained afterwards; and 14 days were to be allowed for the delivery; and the vendor gave a note to the vendee, addressed to the warehouse-keeper, directing him to *weigh and deliver* to the vendee *all his starch:* held that under this contract the absolute property in the goods did not vest in the vendee *before the weighing*, which was to precede the delivery, and to ascertain the price; and that part of the starch having been weighed and delivered to the vendee by his direction, the vendor might notwithstanding such part delivery upon the bankruptcy of the vendee, retain the remainder, which still continued unweighed in the warehouse, in the name and at the expense of the vendor.

Hanson & al. (Assignees) v. *Meyer.* 6 E. R. 614

28. If a person contracts with another for a chattel which is not in existence at the time of the contract, though he pays him the whole value in advance, and the other proceeds to execute the order, the buyer acquires no property in the chattel till it is finished and delivered to him; and therefore trover cannot be maintained for it. *Mucklow and others, Assignees of Royland,* v. *Mangles.* 1 W. P. T. 318

29. A power of attorney to receive all salary and money, with all the principal's authority to recover, compound and discharge, and to give releases, and appoint substitutes, does not authorize the person possessing the power of attorney, to negotiate bills of exchange received by him; nor to indorse them in his own name; and therefore trover may be maintained against him for bills so negociated.

Hogg v. *Snaith.* 1 W. P. T. 347

30. Upon a contract to carry and deliver goods, the possession of the goods, still remaining with the defendant, trover lies.

Dewell v. *Moxon, & al.* 1 W. P. T. 391

31. If a thing (e. g. a lease) be deposited by one, with the authority of another, and received by the bailee, on account of both, one alone cannot demand it of the bailee without the authority of the other, so as to maintain trover on the bailee's refusal to deliver it.

May & al. v. *Harvey.* 13 E. R. 197

TRUST AND TRUSTEES.

1. A clause in a marriage settlement, "that the trustees should not be chargeable with, or accountable for, any money arising in execution of the said trusts, but what the person or persons so to be accountable should actually receive," does not bind the trustees generally as a *covenant*, but is a clause of indemnity to take away that responsibility which each would otherwise be subject to for the acts of the others; and only leaves each of them accountable for what he actually receives, as for a single contract debt.

Bartlett v. *Hodgson.* 1 T. R. 42

2. If a person jointly interested with an infant in a lease, obtain a renewal to himself only, and the lease prove beneficial, he shall be held to have acted as trustee, and the infant may claim his share of the benefit; but if it do not prove beneficial, he must take it to himself only.

Ex parte Grace. 1 B. & P. 376

3. A deed of trust conveyed the lease of a farm, and all the grantor's effects and all debts due to him, to trustees in consideration of a certain sum to be paid to him by one of the trustees; in trust, to dispose of all the property, and out of the produce to reimburse the trustee the sum advanced by him to the grantor, and all other the trustees' demands upon him; and then to pay all such debts as were justly due from the grantor, as the trustees in their discretion should think proper; the surplus to be holden for the benefit of the grantor's wife (whose property the bulk of it originally was) as a separate maintenance for her, in consequence of a separation between them on account of her husband's ill usage:

held, that such deed was not fraudulent or void against creditors, it appearing to have been made *bonâ fide* at the time, and that all the creditors of the grantor known at the time, had upon application to the trustees, received payment of their debts: held also that the wife was not liable, as executrix *de son tort*, after the death of her husband intestate, on account of her possession of this property under the deed of trust. *Nunn & al. (Assignees)* v. *Wilsmore, Executrix.* 8 T. R. 521

4. *A.*, tenant for life, remainder to his son *B.* in tail, *reversion to himself in fee*, agreed with *B.* in order to relieve themselves from their debts, to bar the entail: and in 1773 they conveyed estates in *N.* and *L.* to the use of trustees and their heirs, in trust to sell the *N.* estates and pay the debts, &c.; and as to the *L.* estate (the only one in question), in trust that the trustees should, *with the consent* of *A.* and his wife, and of *B.*, or the survivor, *sell the inheritance* in fee, and apply the purchase-money on the trusts after mentioned: with a *proviso* that the *rents, issues and profits*, should *until sale of the inheritance*, be received by such person and for such uses as they would have been if the deed had not been made and no fines levied. And as to the money arising from the sale of the *L* estate, in trust to invest the same, with the like consent, in the purchase of other lands in fee, to be settled, subject to certain charges, on *A.* for life, *remainder to* B. *in fee;* the Court of K. B. held,

1st. That the use of the *L.* estate was immediately executed in the trustees, even before any consent given to the sale of it by *A.* &c.; and that, notwithstanding the proviso, which stipulated only for the receipt, by the party before entitled, of the *rents*, &c., as contradistinguished from the legal estate of the *inheritance*, which was left in the trustees. And that this was not a mere *power of sale* in the trustees tacked to the legal estate of the owner.

2ndly, That though *A.*, who survived his wife and *B*, continued in possession of the *L.* estate down to 1795, when he sold it, and died some time after; and though, after the sale of the *N.* estate in 1774, for the payment of the debts, the trustees of the *L.* estate never interfered in further execution of the trust during *A.*'s life-time, but brought ejectment after his death; yet that no presumption could be made at the trial in favour of the defendants, who purchased from *A.* in 1795, for a valuable consideration, without notice, either that the trustees had re-conveyed the legal estate to *A.* in his lifetime, as upon a satisfied trust, according to the old uses; or had conveyed a new estate to him as a purchaser under a sale by them in execution of their trust. For a court of law will never presume a reconveyance by trustees, where such reconveyance would be a breach of their trust; which would be the case here upon a supposition that *B.*, the son, was a purchaser for a valuable consideration of the remainder in fee, which was to be limited to him upon the settlement of the new estate to be acquired with the purchase-money of the *L.* estate. Nor is such a presumption to be made in the first instance, even in the case of a doubtful equity, before a court of equity has declared in favour of the equitable title of the party for whom such presumption is required. Nor was there any evidence to support a presumption that *A.* had purchased a new estate of the trustees. *Keane d. Byron (Ld.) & al.* v. *Deardon & al.* 8 E. R. 248

5. One, after devising certain lands to trustees and their heirs, to pay debts in aid of the personal estate, devised the surplus, and all his other lands, &c. to his 1st, 2d, 3d, and other sons, successively, for life; with successive remainders to trustees and their heirs, to preserve subsequent estates during the lives of the several tenants for life; with several remainders successively to the first and other sons of the bodies of the testator's several sons in tail male; with like remainders to his daughter *S.* for life, to trustees, &c. and to her first and other sons, successively, in tail male: with a proviso, that each of the testator's sons, as he came into possession, might from time to time grant or appoint all or any part of the lands whereof he should be so seized and possessed *to trustees*, on trust by the rents and profits to pay a jointure to any wife, &c. *for the term of each*

such wife's natural life only. There were also powers by deed to charge the lands with portions for daughters and younger children, and to lease for twenty-one years.

The eldest son, having married, by deed, reciting the will and power, conveyed certain of the lands to *trustees and their heirs,* on trust by the rents and profits to raise and pay a jointure to his wife *during her natural life only;* and charged the lands with portions for younger children, if any; which deed also contained a covenant for quiet enjoyment *during the wife's life:* the Court of K. B. held that by such deed the *trustees* took a *fee.*

Wykham v. *Wykham.* 11 E. R. 458

V.

VARIANCE.

I. *Between the Declaration or Plea, &c. and the Writ or the Proof produced.*

1. In an action of debt on a simple contract the declaration is good, though it specify *a less sum* in the several counts than is demanded in the recital of the writ, and yet assigns as a breach the non-payment of the sum demanded in the writ.

M'Quillin v. *Cox.* 1 H. B. 249

2. In such action the plaintiff may prove and recover a less sum than is stated to be due. 1 H. B. 249

3. A variance between the writ and count (the *ac etiam* being in *case on promises,* but the declaration *in debt*) is not a ground for entering an *exoneretur* on the bail piece, where the sum sworn to is under 40*l.*

Lockwood v. *Hill.* 1 H. B. 310

4. Where the declaration set forth the precept from the sheriff to the port reeve of a borough, the improper insertion of the word "*if*" in such precept, *viz.* "and *if* the said election so made" &c. is not a fatal variance, but is to be rejected as surplusage.

King v. *Pippett.* 1 T. R. 235

5. In an action against the sheriff for taking goods without levying a year's rent, the plaintiff undertaking to set forth the particulars of the demise, (which was unnecessary), and not proving them as laid, must be non-suited.

Bristow v. *Wright.* (*Dougl.* 642.) 1 T. R. 236, *n.*

6. In an action on the case against the sheriff for negligent and wrongful conduct in conducting the sale of the plaintiff's goods under a writ of *fieri facias,* by which they were sold much under value, where, in stating the substance of the writ, the count alledged that the sheriff was commanded to levy 80*s.* awarded to *J. C.* for his *damages* sustained *by occasion of the detaining the debt;* that is proved by the writ, which stated that the 80*s.* were awarded to *J. C.* for his *damages* sustained *as well* by reason of *detaining the debt* as for his *costs,* &c.: for *costs* are in legal sense included in the word *damages.*

Phillips v. *Bacon.* 9 E. R. 198

7. In an action by the bailiff of *Westminster* against the defendant, in the nature of an escape, the declaration stated a *latitat* against *Donner* and *J. Doe,* with an *ac etiam* against *Donner* for 30*l.* The writ produced *in evidence* was against *Donner* and two others, and not against *J. Doe.* Lord *Mansfield* held this to be good, it being a sufficient writ to warrant the arrest. *Hendray* v. *Spencer,* Sittings after *Michaelmas* 1773, at *Westminster.* 1 T. R. 238, *n.*

8. In an action for non-residence, the parish was styled in the declaration *St. Ethelburg;* the real name appeared in evidence to be *St. Ethelburga*: held a fatal variance. *Wilson q. t.* v. *Gilbert.* 2 B. & P. 281

9. A variance in setting out one or several covenants in a lease, on which breaches were assigned, viz. the *Cellar-beer* field, instead of the *Aller-beer* field, held fatal; being considered as part of the description of the deed declared on; though the plaintiff waved going for damages on the breach of that covenant.

Pitt v. *Green.* 9 E. R. 188

10. Where three parish churches have been united by 22 *Car.* 2. *c.* 11. the benefice may be described in pleading as one rectory. *Wilson q. t.* v. *Van Mildert.* 2 B. & P. 394

11. If a bill drawn by *John Crouch* be declared upon as drawn by *John Couch,* the variance is fatal.

Whitwell v. *Bennett,* 3 B. & P. 559

12. In an action for bribery, the declaration stated the precept to be directed to the *mayor* only; but the precept proved was directed to the *mayor and burgesses:* which was held to prove the declaration. *Cuming* v. *Sibley*, *E.* 9 *G.* 3. *C. B.* 1 T. R. 239. *n.*

13. So where the precept declared on was to the bailiffs and jurats, and that proved was directed to the bailiff and jurats. *Warr* v. *Harbin.* 2 H. B. 113

14. In an action for an amercement in a court-leet, if the declaration state the court to have been holden before the *steward* of the manor, but the evidence prove it to have been holden before the *deputy steward*, it is a fatal variance. *Wyvill* v. *Shepherd.* 1 H. B. 162

15. *S. P.* Where the declaration stated that the defendant was summoned to serve on the jury of the court-leet and *court-baron*, but the summons was to serve on the jury of the *court-leet only*. *Grey* v. *Wheatly* (*N. P.*) 1 H.B.163,*n.*

16. Evidence that the homage have been accustomed to assess a certain sum of money *as a heriot* upon alienation, and that such assessment has always been made with reference to the best chattel of the tenant, will not support an avowry for *a heriot in kind* upon alienation.

Parkin v. *Radcliffe.* 1 B. & P. 393

17. On a justification by the lord of a manor, under a custom that the lord should have the best beast on the tenant's death, the custom proved was that the lord should have the best beast *or good*, and the whole Court of C. P. held the variance fatal. *Adderley* v. *Hart*, *T.* 4 *G.* 1. 1 B. & P. 394, *n.*

18. In an action on a bail bond, the special original being returnable *coram domino rege ubicunque tunc fuerit in Angliâ*, the omission of the word *ubicunque* was held not fatal, for the writ is to compel appearance before the king *in his court*, and not *in person*, and therefore it could not, as was objected, be to compel appearance out of *England*. *Shuttleworth* v. *Pilkington* (2 *Stra.* 1155.) 1 T. R. 240, *n.*

19. In cases upon contracts it is necessary to set out the contract truly; and a difference in any part is fatal, because the contract is entire. 1 T. R. 240

20. Where the contract declared upon was, that the defendant should deliver to the plaintiff all his tallow at 4*s. per* stone; and the contract proved was, that the defendant should deliver it at 4*s. per* stone, *and so much more as the plaintiff paid to any other person;* this was held a fatal variance.

Churchill v. *Wilkins.* 1 T. R. 447

21. But where the whole consideration of a promise is truly stated, and also all such parts of the promise itself, the breach of which is complained of; it is not necessary to state in the declaration other parts of the promise, not qualifying or varying in any respect the parts so complained of as broken. As where the plaintiff declared, that in consideration of his re-delivery to the defendant of an unsound horse, which he had before then sold to the plaintiff, the defendant promised to deliver to him another horse in lieu, &c. which should be *worth* 80*l.* and be *a young horse;* and then alledged a breach in both those respects: held sufficient; though the proof were not only of a promise that the second horse should be worth 80*l.* (which it was not) and be a young horse, but also of a warranty that it was *sound*, and *had never been in harness.*

Miles v. *Sheward.* 8 E. R. 7

22. Declaration by a sailor for wages, and the average price of a negro slave for a certain voyage (to wit) "*from the port of* London *to the coast of* Africa, *and from thence to the* West Indies;" in the articles it was called a voyage "from the port of *London* to the coast of *Africa*, from thence to the *West Indies or* America, *and afterwards to* London *in* Great Britain, *or to her delivering port in* Europe;" held that the variance was fatal, notwithstanding the *scilicet*, and although the voyage was in fact put an end to in the *West Indies;* and that the contract for the price of a slave, not being included in the articles pursuant to 2 *G.* 2. *c* 36. was void.

White v. *Wilson.* 2 B. & P. 116

23. Declaration for 52*l.* 10*s.* for run-money, evidence, a note for 52*l.* 10*s.* for run money, with an additional stipulation written after signature of the note, for a pint of rum *per* day; and held no variance.

Baptiste v. *Cobbold.* 1 B. & P. 7

24. In a declaration on an agreement for a wager, this indorsement on the agreement; "N. B. To start, P. P., in 15 days from this date," was not noticed;

the omission was held to be immaterial; " P. P." being considered merely insensible letters.

Whaley v. *Pajot* 2 B. & P. 51

25. An avowry for an increased rent on a demise for every acre of the land which should be converted into tillage, is supported (under 11 *G.* 2. *c.* 19.) by the evidence of a lease for a term of years, with a covenant to pay the increased rent for every acre which should be so converted *during a part of the term e. g.* for the last three years.

Roulson v. *Clarke.* 2 H. B. 563

26. Evidence of an agreement to deliver goods to the defendant is a variance from a count on an agreement to deliver them to another person.

Leery v. *Goodson.* 4 T. R. 687

27. Under a count for money had and received by three defendants, the plaintiff cannot give in evidence money had and received by them and by a fourth partner who is now dead.

Spalding v. *Mure & al.* 6 T. R. 363

28. Plaintiff covenanted to build two houses for 500*l.* by a certain day, and averred in an action of covenant for the money, that the houses were built in the time: evidence that the time had been enlarged by *parol* agreement, and the houses finished within the enlarged time, will not support the declaration.

Littler v. *Holland.* 3 T. R. 590

29. An agreement declared on to sell oats at so much *per* bushel must be taken to mean the *Winchester* bushel, and will not be proved by evidence of an agreement to sell by some other bushel. *Hockin* v. *Cooke.* 4 T. R. 314

30. A corrupt agreement for the forbearance of money *till one or the other of two days,* at the option of the borrower, must be pleaded according to the fact in the *alternative;* and if it be stated as an absolute forbearance till *one* of those days, the evidence will not support the plea.

Tate v. *Willings.* 3 T. R. 531

31. In an action for the penalty of the statute 12 *Anne c.* 16, the declaration stated a specific sum of money to have been lent (in which the usury consisted); but the evidence was, that the loan was part in money and part in goods, (*i. e.* gold) of a known definite value, which the party receiving the loan *agreed to take as cash.* This was good evidence to support the declaration.

Barbe q. t. v, *Parker.* 1 H. B. 283

32. In an action by the consignor of goods against a carrier for non-delivery, where the plaintiff alledged in his declaration that the defendant undertook to deliver, &c. in consideration of the hire to be paid *by the plaintiff,* and proved that the hire was to be paid by the *consignee,* it was held not to be a variance, the consignor being liable by law.

Moore v. *Wilson.* 1 T. R. 659

33. In an action on a policy of insurance the declaration stated that *after* the making of the policy the ship sailed; the evidence was that she sailed *before:* held that the variance was immaterial.

Peppin v. *Solomons.* 5 T. R. 496

34. If a declaration on a policy of insurance aver the goods to have been seized in a hostile manner by enemies to the plaintiff unknown; the averment is not supported by evidence that they were seized by the Spanish Government as about to be imported contrary to the laws of Spain.

Matthie v. *Potts.* 3 B. & P. 23

35. Proof that defendant's boat run down the plaintiff's in the half way reach in the *Thames* will support an allegation that the boat was run down in the *Thames, near* the half-way reach, in an action on the case for negligence; because the place is not material: *Aliter,* if the place be material; as where a justification is local.

Drewry v. *Twiss.* 4 T. R. 558

36. So where an action on the case was brought upon an agreement that the defendant would procure the plaintiff a booth at the horse-race on *Barnet* common; and the declaration alledged *Barnet* common to be in *Middlesex,* whereas it was in *Hertford,* yet held to be surplusage, because it was immaterial to the agreement whether *Barnet* common lay in *Middlesex* or *Hertford. Frith* v. *Gray, H.* 7. *G.* 3. *B. R.* 4 T. R. 561, *n.*

37. Evidence of a house situate in the parish of *M.* will support an averment of a house " at *S.*," *S.* being extra-parochial, and both places usually going by the name of *S.*

Burbidge v. *Jakes.* 1 B. & P. 225

38. An action on the case for setting up a certain mark in front of the plaintiff's dwelling-house, in order to defame him as the keeper of a bawdy-house, is not local in its nature; and if the declaration, after describing the house as situate in a certain street

called *A.* street, in the parish of *O. A.* (there being no such parish,) afterwards state the nuisance to be *erected and placed in the parish aforesaid*, it will be ascribed to *venue*, and not to local description; and therefore the place is not material to be proved as laid. *Jefferies* v. *Duncombe*. 11 E. R. 226

39. In ejectment the premises being laid to be in *Farnham*, and proved to be in *Farnham Royal*, is not a fatal variance unless it be shewn that there be two *Farnhams*.

Doe d. Tollet v. *Salter*. 13 E. R. 9

40. In assumpsit for use and occupation, it is not necessary to state in what parish the premises are situate, and if the parish is described by a wrong name it is immaterial, at least if it be described by a name generally known, and which could not therefore mislead the defendant.

Kirtlett v. *Pounsett*. 1 W. P. T. 570

41. In an action against the defendant for negligence as an attorney, in not prosecuting a debtor of the plaintiff's to judgment; the return of the writ on which the debtor was arrested being laid to be in the 25th year of the reign, &c. and the writ itself appearing to be returnable in the 24th year, this was held to be a fatal variance, even though the day of the return was alledged in the declaration under a *videlicet*. *Green* v. *Rennett*. 1 T. R. 656

42. An allegation in a plea that "*A.* by his writing sold the aftermath of land to *B.*," was held not proved by evidence that under a statute enabling *A.* to sell by writing) at an auction held for the purpose of selling it, *B.* was the purchaser: that *B.* gave a promissory note for the sum, and that *B.*'s name was written (by *A.*'s agent) in the printed catalogue as the buyer.

Symonds v. *Ball*. 8 T. R. 151

43. Proof that the defendant agreed to sell his horse, warranted sound, to the plaintiff for 31*l.* 10*s.*, and at the same time agreed that if the plaintiff would take the horse at that value, he, the defendant, would buy another horse of the plaintiff's brother for 14*l.* 14*s.*, and that the difference only should be paid to the defendant, will support a count charging only, that in consideration that the plaintiff would buy of the defendant a horse for 31*l.* 10*s.* the defendant promised that it was sound, and that in fact the plaintiff did buy the horse *for that price, and did pay to the defendant the* 31*l.* 10*s.*

Hands v. *Burton*. 9 E. R. 349

II. *In Indictments.*

1. *Undertook* for *understood*, in an indictment for perjury, held an immaterial variance. *R.* v. *Beach*, (*Cowp.* 229.) *E.* 26 *G.* 3. (cited) 1 T. R. 237

2. An indictment for an assault had these words, "whereby his life was greatly despaired of;" an indictment for perjury committed on that trial, setting forth the former indictment, omitted the word "despaired," which was supplied by the court.

R. v. *May*, (*Dougl.* 183.) *ib.*

3. An indictment for perjury stated the bill in Chancery to be directed to *Robert* Lord *Henley*, &c. whereas it was to Sir *Robert Henley*, Knt. &c., and the objection was over-ruled.

R. v. *Lookup*, *T.* 7. *G.* 3. *B. R.* (cited) 1 T. R. 240

III. *In Records; Statutes, &c. or the reciting them.*

1. The record in an action for false imprisonment set forth a few of the first words in a bill of *Middlesex*, and then added an *&c.*, the *&c.* was held by *Lee*, Ch. J. to be no variance from the bill of *Middlesex*, when read at the trial. *Wilson* v. *Mawson*, Sittings after *M.* 13 *G.* 3. at *Westminster*. (cited) 1 T. R. 237

2. An averment in a declaration, of the day of a former trial must exactly agree with the record to be produced in evidence to support it, though it be laid under a *videlicet*.

Pope v. *Foster*. 4 T. R. 590

3. In an action on the case for a malicious prosecution, it is not material for the plaintiff to prove the exact day of his acquittal as laid in the declaration, so that it appears to have been before the action brought: and therefore a variance in that respect between the day laid and the day stated in the record, which was produced to prove the acquittal, is not material; the day not being laid in the declaration as part of the description of such record of acquittal.

Purcel v. *Macnamara*. 9 E. R. 157

4. In an action on a judgment, if the declaration state the judgment to have been recovered in a term different from that which appears on the record, it is a failure of record.

Rastall v. *Stratton*. 1 H. B. 49

5 It is also a variance if the declaration states the judgment against *one* defendant only, when it was against more than one. 1 H. B. 49

6. An allegation in a declaration, with a *prout patet*, &c. that the plaintiffs *by the judgment of the court recovered* against the bail, is not proved by the production of the recognizance of bail, and the *scire facias* roll, which latter concluded in the common form; "Therefore it is considered that the plaintiffs *have their execution* thereupon against the bail:" for this is *an award of execution;* or at most *a judgment of execution*, and not *a judgment to recover*.

Phillipson v. *Mangles*. 11 E. R. 516

7. In an action for a malicious prosecution, the copy of the original roll or record of acquittal given in evidence, stated the finding of the bill of indictment against the now plaintiff *in B. R.*, the process to bring in the party, her appearance, and plea of not guilty in *Mich.* term, and the joining of issue *in the same court:* and then it stated the *venire facias juratores* returnable in *Hilary* term, and the *distringas juratores*, by which the sheriff is commanded to have the jury *before our said lord the king at* Westminster, *on* Wednesday *next after* 15 *days from* Easter, or *before the Lord Chief Justice* if he should come *before that time, i. e. on* Tuesday *next after the end of the term* (Hilary), at Westminster, &c. *in the great hall of pleas there;* and then after giving a day in bank to the prosecutor and defendant, it proceeded on which day, viz. *on* Wednesday *next after* 15 *days, &c. before our said lord the king, at W.*, came the parties; and the Chief Justice before whom the said jurors came to try, &c. sent here his record (which is the *nisi prius* record) *in these words;* (which are the words of the *postea* indorsed on the *nisi prius* record;) viz. *afterwards, on the day, and at the place last within mentioned*, before the Chief Justice, &c. and so it proceeded to set out the trial, and the verdict of not guilty; (which is the conclusion of the *postea* on the *nisi prius* record sent into the court in bank by the Chief Justice:) and then the original roll proceeded— *Whereupon, all the premises being seen by the court of our said lord the king* now here, it is considered and adjudged *by the said court* now here, that *M. W.* (the now plaintiff) do depart here without delay, &c.—

The form and component parts of the original roll, or record of acquittal, being thus understood; it follows that the words of the postea, "afterwards, *on the day and at the place last within mentioned*," stated in the indorsement on the *nisi prius* record, as sent by the Lord Chief Justice into the court in bank, refer to *the day and place last mentioned* in the *distringas juratores* set forth in that record; namely, to "*Tuesday* next after the end of the "term (*Hilary*), at *Westminster*, &c. "in the great hall of pleas there;" which was the day and place at *nisi prius* given; and not to the "*Wednesday* next after 15 days, &c. *before our said lord the king at W.*," which was the return day in bank in the subsequent term, and consequently after the trial was had; though the statement of this return day intervenes on the roll between the statement of the day and place given to the jury in the *distringas*, and the statement of the *postea* indorsed on the *nisi prius* record as sent in by the Lord Chief Justire.—

And as by the roll it appeared that the trial was at *nisi prius*, and the judgment of acquittal in bank; it was therefore held not to prove an allegation in the declaration, that "the "defendant (the now plaintiff) *on* "Wednesday *next* after 15 days, &c. "*in the court of our said lord the* "*king, before the king himself, at* W. "*before the Lord Chief Justice* as- "signed to hold pleas before the "king himself, &c. *W. J.* being as- "sociated with him, &c. was in due "manner and according to the due "course of law *by a jury* of the said "county of *M. acquitted*, &c.;" which allegation supposed the trial to have been in bank on the return day there given.

Woodford & al. v. *Ashley*. 11 E. R. 508

8. By statute 28 *Eliz. c.* 4. sheriffs are liable to a penalty for taking more than a certain sum on executions "upon the body, lands, goods, or "chattels; a declaration on this act, in reciting the statute, stated it thus, "body, lands, goods, *and* chattels;" and this was held to be a fatal variance in arrest of judgment.

R. v. *Marsack*. 6 T. R. 771

9. Any material mis-recital of a statute in a declaration founded on the statute, is a ground to arrest the judgment. 6 T. R. 771
10. Whether a mere literal misrecital, not varying the sense, be also a ground to arrest the judgment? *Qu.* 6 T.R. 776

IV. *How to be taken Advantage of.*

1. In an action against three on a promissory note, two of whom are stated to be outlawed, the third may take advantage of the misnomer of his companions, upon the general issue, on the ground of a variance between the contract declared upon, and that proved. *Gordon* v. *Austin.* 4 T. R. 611
2. The court will not, on motion, permit a defendant to take advantage of a variance between the sum mentioned in the *ac etiam* part of the *latitat*, and the declaration. *Turing* v. *Jones.* 5 T. R. 402
3. Though they will when the variance is in the nature of the action; as where the plaintiff sues out a writ *quare clausum fregit*, and declares in trover. 5 T. R. 402
4. So when the objection is to the plaintiff's right of suing, as if he sue out a writ in his own name, and declare as executor. 5 T. R. 402 and *Douglas & al.* v. *Irlam.* 8 T.R. 416
5. If the writ be, that the defendant answer in "a certain plea of trespass on the case on promises," and the declaration be in debt for goods sold and delivered, and money borrowed, the court will discharge the defendant on entering a common appearance. *Kerr* v. *Sheriff.* 2 B. & P. 358
6. The Court of K. B. refused to set aside the proceedings for irregularity for a variance between the original writ and the declaration. *Spalding* v. *Mure and others.* 6 T. R. 363
7. The Court of C. P. refused to set aside proceedings for irregularity, where the *clausum fregit* was against two, and the declaration against one. *Spencer* v. *Scott.* 1 B. & P. 19
8. The distinction is, that in process *not bailable*, if the writ be joint and the declaration several, it is regular.—*Secùs*, in bailable process. *Loveridge* v. *Botham.* 1 B. & P. 49 (See PRACTICE XXIII. and 4 T. R. 697, *n.* and 4 E.R. 589.)
9. But if process be sued out in the name of one *plaintiff*, and the declaration delivered in the name of two, it is bad. *Rogers* v. *Jenkins.* 1 B. & P. 383

VENIRE DE NOVO.

1. Generally speaking, a Court of Error cannot award a *venire de novo* when the proceedings originate in an inferior court. *Trevor* v. *Wall.* 1 T. R. 151
2. But where there was a bill of exceptions to the rejection of evidence in the Court of Great Sessions in *Wales*, and upon error in *B. R.* the evidence was deemed admissible: the Court of *B. R.* thought themselves called on to award a *venire de novo* (into the next *English* county); as without the intervention of the jury no final judgment could be given on the record. *Davies* v. *Pierce.* 2 T. R. 125 [And see the note in 2 T. R. 126; and also the notes in *Johnstone* v. *Sutton*, 1 T. R. 528, as to the power of a Court of Error to award a *venire de novo*.]
3. That the Court will only award a *venire de novo* where there is a defective finding in the verdict. *Goodtitle d. Jones* v. *Jones.* 7 T. R. 52

VENUE.

I. *Laying.*

1. *A.* by deed executed in *London* for securing the repayment of money lent to *B.*, is appointed receiver of *B.'s* rents in *Middlesex*, with a pretended salary which enables him to retain usurious interest; he accordingly receives the rents in *Middlesex*, but settles the account in *London*, and *there* pays the balance on which the usurious interest is allowed; the offence is completed in *London*, and the venue in a *qui tam* action for the penalty is properly laid there. *Scott q. t.* v. *Brest.* 2 T. R. 238
2. It seems it might be laid in either, for where there are two facts which are necessary to constitute one offence, and they take place in two different counties, the plaintiff may *ex necessitate* lay the *venue* in either. 2 T. R. 241
3. Where there are several facts material to the plaintiff's action arising in different counties, he may bring his action (covenant) in either. *The Mayor, &c. of London* v. *Cole.* 7 T. R. 583
4. In an action on 1. 2. *P. & M. c.* 12 for driving a distress out of the hundred into another county the venue may be of either county. *Pope* v. *Davis.* 2 W. P. T. 252
5. If a draft be given for usurious interest and receipt taken for it in the

county of *A.* and the draft be afterwards exchanged for money in the county of *B.* the usury is committed in the county of *B.*, and the venue must be laid there.

Scurry q. t. v. Freeman. 2 B. & P. 381

6. The offence of selling coals of a different description from those contracted for, upon the statute 3 *G.* 2. *c.* 26. § 4. is complete in the county where the coals are *delivered*, and not where they were *contracted* for, the contract not being for any specific parcel of coals, but for a certain quantity of a certain description. But *the not justly measuring* such coals is a local omission of a local act, required by the 13th section of the act to be performed at the place where the coals are kept for sale, at which place the bushel of Queen *Anne* is required to be kept and used for the purpose of measuring the coals into sacks of a certain description, in which they are to be carried to the buyer; and therefore the offence is local, and must be laid in the county where the coals were put into the sacks without having been so *justly measured.*

Butterfield q. t. v. *Windle.* 4 E.R. 385

7. A *scire facias* upon a recognizance of bail taken in open court in *B. R.* is properly suable in *Middlesex*, where the record is; though all the previous proceedings which commenced by original were in *London*. And *semble* that it could not be sued elsewhere than in *Middlesex*.

Coxetur v. *Burke.* 5 E. R. 461

8. The *venue* in the margin may *assist* but cannot hurt the plaintiff.

Mellor v. *Barber* 3 T. R. 387

9. In a plea in abatement that another person ought to have been sued with the defendant, it is not necessary to lay a *venue.*

Neale v. *De Garay.* 7 T. R. 243

10. And if it be pleaded that such other person is alive, to wit, in *Spain*, it will be considered as pleaded without any *venue.*

11. Where a request to the defendant to do an act is necessary to be alleged in order to give the plaintiff his cause of action; and it is alledged, but without a particular *venue* (there being a general *venue* laid in the preceding part of the declaration); such omission cannot be taken advantage of in arrest of judgment since the stat. 4 *Anne*, *c.* 16. § 1. being mere matter of form, available only upon special demurrer; and this, though judgment passed by default on which a writ of inquiry was executed. *Bowdell* v. *Parsons.* 10 E.R. 359

II. *Changing.*

1. All affidavits for changing the *venue* in any action shall be drawn up "upon reading the declaration." *Reg Gen. K. B. T.* 49 *G.* 3. 11 E. R. 273

2. An affidavit to change the *venue* from *A.* to *B.* must state that the cause of action arose in *B.*, *and not in A.*, or elsewhere out of *B.*

Allen v. *Griffiths.* 3 T. R. 495

3. The *venue*, in an action for a libel, written in one county and sent into another, cannot be changed into the county where written; for the defendant cannot swear that the cause of action arose wholly in that county.

Pinkney v. *Collins.* 1 T. R. 571
And *Clissold* v. *Clissold.* 1 T R. 647

4. But the court will change the *venue*, in an action for a libel, into a county in which it was both written and published. *Freeman* v. *Norris.* 3 T. R. 306

5. So if written in *England* and sent by letter out of the kingdom, it may be changed (from *London* where it was laid) to the county where written.

Metcalf v. *Markham.* 3 T. R. 652

6. Rule absolute in the first instance of changing the venue from an *English* to *Welsh* county on the usual affidavit.

Hopkins v. *Lloyd, & Hughes* v. *Hughes.* 6 E. R. 355

7. In debt on bond, the court, upon the application of the defendant, will change the *venue* to the place where his defence arises, and the plaintiff's as well as the defendant's witnesses reside.

Foster v. *Taylor.* 1 T. R. 781

8. But see several instances where similar applications were refused, when the *defendant's* witnesses only, resided in the county. 1 T. R. 782, *n.*

9. In covenant upon a lease, a view being proper to be had, the venue was changed to the county where the premises lay; though most of the plaintiff's witnesses resided in the county where the venue was laid.

Hodinott v. *Cox.* 8 E. R. 268

10. In an action on a promissory note the Court of (C. P.) will not change the venue from *London*. to the county where it was made, on the defendant's stating that all his witnesses live there; but if his affidavit shew the number of his witnesses, and that a serious inconvenience would arise from bringing them up, it will.

Evans v. *Weaver.* 1 B. & P. 21

11. Nor will they change the venue in an action on an award, though the declaration contain the common counts; nor oblige the plaintiff to undertake to give evidence on the count upon the award.

Whitburn v. *Staines*. 2 B. & P. 355

12. Where the cause of action substantially arises in another county than that in which the venue is laid by the plaintiff, and the convenience and justice of the case require the trial to be had there, where all the witnesses reside, at a great distance from the county where the venue is laid; the court, on the application of the defendant, will change the venue, on his agreeing to admit a particular fact which in point of form exists in the original county.

Holmes v. *Wainwright*. 3 E.R. 329

13. The Court (C. P.) will not discharge a rule for changing the venue from *A.* to *B.*, upon an affidavit shewing that the cause of action arose partly in *A.* and partly in *B.*; and that all the witnesses reside in *A.*; the plaintiff must undertake to give material evidence in *A.*

Henshaw v. *Rutley*. N. R. 110

14. In an action on a deed that Court will not change the venue to the county where it was executed on the ground of the witnesses residing there: when from the pleadings it appears not to be necessary to produce many witnesses.

Watt v. *Daniel*. 1 B. & P. 425

15. In an action for infringing a patent, the plaintiff cannot change the venue from *Middlesex* to any other county.

Cameron v. *Gray*. 6 T. R. 363

16. It is no answer to an application to change the *venue* from *London* to *Essex* on the usual affidavit in an action commenced by assignees, that the commission was issued and the bankruptcy declared in *Middlesex*, and the assignees chosen in *London*; but in such case the plaintiffs can only retain their *venue* by undertaking to give material evidence where it is laid. *Clarke & al.*

Assignees v. *Reed*. N. R. 310

17. If the *venue* be changed from *A.* to *B.* on the usual affidavit that the cause of action arose wholly in *B.*, when in fact part of the cause arose in another county, the court will order the *venue* to be brought back to *A.*

Cailland v. *Champion*. 7 T. R. 205

18. The *venue* may be changed in an action for criminal conversation on the usual affidavit, that *the whole cause of action*, if any, arose in the county to which it is changed; for the whole cause of action is the trespass on the plaintiff's wife; and the *venue* can only be brought back by the plaintiff's undertaking to give material evidence in the original county.

Guard v. *Hodge*. 10 E. R. 32

19. Though the *venue* be changed by the defendant upon a false affidavit, yet the plaintiff cannot bring it back to the county where it was first laid, without the usual undertaking to give material evidence in that county. *Price* (*Bart.*) v. *Woodburn*. 6 E. R. 433

20. An affidavit of the plaintiff, that the cause of action arose where the *venue* is laid, is not sufficient cause for him to shew against the changing the *venue*. But he must also *undertake to give material evidence* in that place.

French v. *Coppinger*. 1 H. B. 216

21. The plaintiff shewed the defendant's affidavit, made for the purpose of changing the *venue*, to be untrue; and the cause of action arising in more counties than that in which the *venue* was laid, the court retained the *venue*, upon the plaintiff's undertaking, in the alternative, to give material evidence in some one of the counties where the cause of action arose.

Hunt v. *Bridgeford*. 1 W. P. T. 259

22. An application to change the *venue*, from *A.* to *B.* in an action for goods sold and delivered, upon an affidavit that the cause of action arose at *B.* and not elsewhere, may be successfully answered by an affidavit that the goods were sold at *C.*

Collins v. *Jacobs*. 3 B. & P. 579

23. Where a rule to change the *venue* in an action of *assumpsit* from *A.* to *B.* has been discharged on the plaintiff's undertaking to give evidence of some matter in issue arising in *A.*, the undertaking is complied with by proving a rule of court in *A.*, that the defendant shall be at liberty to pay money into court; though that rule was obtained after the discharge of the rule for changing the *venue:* for the payment of money into court is an admission of the cause of action.

Watkins v. *Towers*. 2 T. R. 275

24. Such undertaking of a plaintiff may be supported by proof of the cause of action being in a foreign country.

Gerard v. *De Robeck*. 1 H. B. 280

25. Where the cause of action arose partly in *Derbyshire* and partly in *Ireland*, the court refused to change the *venue* from *London* to *Derby*, on an affidavit that the cause of action arose in D. and *I.*, and not in *London* or elsewhere than in *D.* and *I.*
Walker v. *Wright* 4 E.R. 495

26. The Court discharged a rule for changing the *venue* upon an affidavit of the plaintiff, that the cause of action arose principally in *Ireland*.
Hope v. *Bennet*. 2 N. R. 397

27. If the cause of action can be proved partly to arise in a foreign country the plaintiff may safely give the requisite undertaking to retain the *venue*.
M'Clure v. *M'Keand*. 2 W. P. T. 197

28. Proving a deed inrolled of record in *A.*, is a sufficient compliance with the undertaking of a plaintiff to retain the *venue*. 2 T. R. 275

29. The undertaking to give material evidence, made to retain the *venue*, does not apply to collateral issues, but is confined to the matters stated in the declaration. *Cockerell* v. *Chamberlayne*. 1 W. P. T. 518

30. The defendant cannot change the *venue* after an order for time to plead, on the terms of pleading issuably and taking short notice of trial for the first sittings in *London* or *Middlesex*.
Shipley v. *Cooper*. 7 T. R. 698

31. But merely taking out a summons for time to plead, if defendant do not accept the terms, is no waiver of the right to change the *venue*.
Wilson v. *Harris*. 2 B. & P. 320

32. After plea pleaded the *venue* cannot be changed.
Talmash v. *Penner*. 3 B. & P. 12

33. But if the defendant plead pending a rule *nisi* for changing the *venue*, the court will notwithstanding allow him to change the *venue*. *ib.*

34. So if pending a rule for changing the *venue*, the defendant plead in the action, and notice of trial be served, the Court will still allow the *venue* to be changed; and, in such case, no costs are payable.
Moses, v. *Stephenson*. 1 W. P. T. 58

35. Defendant having put off the trial at the assizes on the absence of a witness, the Court refused to let the plaintiff change the venue to *Middlesex*. *Pearce* v. *Porklington*. 2 N.R. 58

36. Upon moving to change the venue into a county palatine, it is necessary to undertake not to assign error upon the want of an original.
Cove v. *Heaton*. 1 W. P. T. 120

37. It is matter of favour to change the *venue* to a county palatine. And where the design is to oppress the plaintiff, the Court will not grant the indulgence.
Gibson & al. v. *Macbride*. 1 W.P.T. 432

VERDICT.

1. Where a special verdict concludes generally, the whole case must appear on the record.
R. v. *Calder Navigation*. 2 T. R. 666

2. If the plaintiff has evidently sustained some damage, and the jury being unable to ascertain the amount, find a verdict for the defendant, the court will permit the plaintiff to enter a verdict for nominal damages.
Feize v. *Thompson*. 1 W. P. T. 121

VISITOR.

1. Whether, in case a dean and chapter neglect or refuse to appoint a canon residentiary in proper time, the bishop, by virtue of his general visitatorial power may appoint *pro tempore* till such election be had? *Qu. Chichester (Bishop)* v. *Harward & al.* 1 T.R. 650

2. There is no lapse to the bishop in the case of a canonry. 1 T. R. 650

3. In the case of a private eleemosynary lay foundation, if no special visitor be appointed by the founder, the right of visitation in default of his heirs devolves upon the king, to be exercised by his great seal. *R.* v. *St. Catherine's Hall, Cambridge*. 4 T. R. 233

4. If a visitor of a college has heard and decided on an appeal, the Court of K. B. has no authority to examine the legality of the judgment.
R. v. *Ely (Bishop)* 5 T. R. 475
(And see *R.* v. *Lincoln (Bp.)* 2 T. R. 338, *n.*)

5. The visitor need not hear parol evidence on such an appeal; it is sufficient if he receive the grounds of the appeal, and the answer to it in writing 5 T. R. 477

6. Mr. *Longmire*, who had been a fellow of *Peterhouse, Cambridge*, and had vacated his fellowship by taking a college living, but had continued his name on the college boards, is not entitled to any preference in the election of a master, as being a member of the *domus* or foundation, under these words: "In cujus vero electione hoc

imprimis observari volumus, ut ipsius domûs atque sociorum ejusdem semper ratio habeatur, ut hi, si qui inter eos ad hoc munus obeundum inveniatur idonei, cæteris præferantur; sin hujusmodi in domo nulli extiterint, tum aliundè assumantur."
R. v. *The Bishop of Ely.* 2 T. R. 290

7. The fellows having returned two persons to the Bishop of *Ely* as general visitor, for him to choose one, according to the directions of the statutes, to which return the bishop is directed to give *plenam fidem* and to appoint one of them *quem magis utilem intellexerit, et præficiat domui et scholaribus, absque morâ in magistrum, ne domui et scholaribus dispendium aliquod inferat longa mora;* and one of the persons returned being a fellow of the college, and the other a member of a different college, omitting Mr. *Longmire,* who was the third candidate; the bishop cannot on that account declare the election made by the fellows to be null, and appoint another than one of the two returned to him to be master, as claiming by lapse under a provision in the statutes, which declared that, in default of appointment by the fellows within a certain time, the bishop should nominate to the mastership. 2 T. R. 290

8. And therefore the court in such case, on the bishop's refusal, granted a *mandamus* to him to appoint one of the two persons presented to him by the fellows. 2 T. R. 290

9. In general the Court of *B. R.* will not interfere in the case of a visitor, or review any determination made by him in that capacity; but this was held not to be a case within the bishop's general visitatorial power, his right being restrained to the selection of one of the two persons presented to him by the fellows, who were the judges of their fitness. 2 T. R. 334, 5

10. Nor could the appointment of the bishop be said to have been done by virtue of his visitatorial power in this instance, even supposing the case to have been within his general jurisdiction, because he did not cite or hear the parties; and it is a judicial act; and unless there be a general visitation of the college, there must be an appeal to the visitor, and he should proceed on that. 2 T. R. 336

11. Where by the statutes of a college the right of appointment to the mastership devolves on a person named, who is also general visitor, on neglect of the fellows to elect, such nominee has not that right as visitor, but by the special appointment of the founder. 2 T. R. 338

12. Then as this was not a visitatorial act, the propriety of the election and the bishop's conduct cannot be inquired into by himself as visitor, because that would be to determine on his own right, for he claims an interest and asserts a right, and a visitor cannot be a judge in his own cause, unless that power be expressly given to him; and in all these cases the power of deciding the question, and construing the statutes, devolves on the courts of law. 2 T. R. 338, 9

13. Where by the constitution of *Exeter* College, *Oxford,* the bishop of *Exeter* was appointed general visitor, to visit by himself or his commissary once in five years, *ex officio,* unless oftener required by the college; and it was provided that he might deprive the rector or expel the scholars, with this qualification, *si tamen ad deprivationem rectoris, aut expulsionem scholaris alicujus, per episcopum aut ejus commissarium agatur,* then if he cannot make out his innocence he shall be removed without further appeal, *dum tamen ad ejus expulsionem,* there shall be the consent of the seven senior fellows; and then if the rector be removed by the bishop's commissary *etiam consentientibus* four of the senior fellows, he may appeal to the bishop; if the bishop deprive the rector without the consent of the four senior fellows, such deprivation is good notwithstanding; for being general visitor he has the power of deprivation necessarily incident to his office, and it can only be abridged by express words, of which there are none here, for the words *si tamen* &c. *dum tamen ad ejus expulsionem,* &c. relate to the fellows and not to the rector; though the words *etiam consentientibus,* &c. do qualify the commissary's power, but not the bishop's. *Per Holt, in Philips* v. *Bury.* 2 T. R. 346

14. But if the consent of the four senior fellows had been necessary to the deprivation of the rector, it would not have been sufficient for the bishop, having first suspended some of the senior fellows, to have obtained the consent of the rest: for the suspension made no vacancy of their offices, but

was only an impediment to their enjoying any benefit from them.
(See title OFFICER.) 2 T. R. 351

15. Under this constitution of the college the visitor can only visit once in five years, unless called upon oftener by the college; and if he come uncalled within the five years, his visitation would be void, and any sentence he might give, a mere nullity, as *coram non judice.* 2 T. R. 348

16. But if a member of the college, expelled by the rector and fellows, appeal to the bishop as visitor, and the bishop appoint a particular commissary to examine the matter, this is not such a visitation as precludes the bishop from visiting again within five years *ex officio;* for, as visitor, he has a constant standing authority at all times to hear and redress the grievances of the particular members.
2 T. R. 346, 348

17. So where the bishop appointed a visitation to be held in the chapel on the 16th *June*, and the rector and fellows refused to open the doors on the day appointed, but protested in the area, and the visitor called over all their names, and swore a person to prove the summons, and went away without doing any more; and afterwards he appointed another visitation in the hall on the 24th *July* following, and called over the names, and registered the act of 16th *June*, notwithstanding a protest against all the proceedings, this visitation is good, and what passed on the 16th *June* was no visitation.
2 T. R. 348, 9. 357

18. The visitatorial power is an appointment of law, and is not of ecclesiastical origin; where the interest of a charity is vested by the donor in trustees, there the law does not raise a visitor; but where they who are to have the benefit of the charity are incorporated, there the law raises a visitatorial power in the founder and his heirs, unless the founder hath appointed some other person.
2 T. R. 352, 3

19. And there is no difference in respect of the visitatorial power between a college and an hospital, where the latter is not governed by trustees; both are eleemosynary, and a college imports a corporation. 2 T. R. 353

20. Spiritual corporations are visited by the ordinary. If he is visitor as ordinary, an appeal lies to his superior; if as patron, no appeal lies.
2 T. R. 353

21. Where a visitor has power to deprive, his sentence is not examinable either as to the cause or the truth of the fact in a court of law; so that if a deprivation be pleaded, there is no occasion to shew the cause, nor is it traversable even in a visitation.
2 T. R. 346, 351

22. Though the statutes of the college enumerate several offences for which the rector shall be deprived, and contumacy is not one of them, yet that doth not tend to abridge the visitor's power of deprivation incident to his office during a visitation, but he may equally deprive for contumacy.
2 T. R. 358

23. Where the founder of an hospital directed, that if in making up the accounts of the wardens triennially going out of office, any doubt should arise, which could not be decided by the new wardens, &c. the ordinary should decide it: and also gave to him the appointment of a master, upon the default of other persons to appoint, within certain times; and power to correct and amove the master for certain causes, and also power to sequester the profits of the wardens, &c. in case of the improper subtraction of a certain sum directed to be kept in a chest for special purposes, until the money was replaced; and also gave to the ordinary the power of *interpreting the statutes* in case of any doubt: and the founder also delegated to the dean and chapter of *York* power to remove the wardens, &c. consenting to mortgage or alienate the lands of the charity; the Court of K. B. held that none of the powers so delegated constituted a *visitor*, so as to exclude the application of the powers granted by stat. 43 *Eliz. c.* 4.; and consequently that a commission of charitable uses issued out of the Court of Chancery under that act was valid. *Kirkby Ravensworth Hospital's Case.* 8 E. R. 221

USE AND OCCUPATION.

1. Debt will lie for use and occupation generally, without setting forth the particulars of the demise.
Wilkins v. *Wingate.* 6 T. R. 62

2. Or stating the place where the premises lie. *King* v. *Fraser.* 6 E. R. 348

3. An action for use and occupation may be maintained by a grantee of an annuity, after a recovery in ejectment against a tenant who was in possession under a demise from year to year, for all rent in his hands at the time of notice by the grantee, and down to the day of the demise, in the ejectment, but not afterwards.

Birch v. *Wright.* 1 T. R. 378

4. A tenant from year to year of a house at a yearly rent becomes a bankrupt in the middle of the year, and his assignees enter and keep possession for the remainder of the year. The lessor cannot maintain an action for use and occupation against the assignees for the bankrupt's occupation as well as their own, without proving their *special instance and request* for the bankrupt to occupy, during the time that elapsed before his bankruptcy.

Naish v. *Tatlock.* 2 H. B. 329

5. If *A.* agree to let lands to *B.* who permits *C.* to occupy them, *A.* may recover the rent in an action against *B.* for use and occupation.

Bull v. *Sibbs.* 8 T. R. 327

6. If a purchaser takes possession of premises under a contract of sale, which, on account of a defect in the vendor's title, fails to be completed; the vendor cannot afterwards recover rent for the period of the purchaser's possession upon an implied contract for use and occupation.

Kirtland v. *Pounsett.* 2 W. P. T. 14

USURY.

1. If the borrower of money give a bond for the principal and interest at five *per cent.* and covenant at the same time also to pay to the lender a certain portion of the profits of a trade carried on by him in partnership with another person, this is an usurious contract, and the obligee cannot recover on the bond; for though he was to gain by the profits, he was not to stand to the losses of the trade.

Morse v. *Wilson.* 4 T. R. 353

2. The loan of money produced by the sale of stock, on an agreement that the borrower shall replace this stock on a certain day, or *repay the money* on a subsequent day, with such interest in the mean time as the stock itself would have produced, is not usurious, though the interest exceed 5*l. per cent.*, unless the transaction be colourable, and mere device to obtain more than legal interest.

And see *Sanders* v. *Kentish.*

8 T. R. 162

3. The defendant being indebted to the plaintiff in 486*l.* 4*s.* 6*d.* for which he was sued; and the plaintiff wishing to invest the amount of the debt in stock on the 19th of *Nov.* 1803, when the same would have purchased 908*l.* 16*s.* 7*d.* stock; in consideration of forbearing his action and demand till the 19th of *Nov.* 1804, takes bond from the defendant, conditioned for the transfer by him to the plaintiff on that day of 908*l* 16*s* 7*d.* stock, with such interest as the same would have produced, as such stock, in the mean time: the Court of K. B. held that this was neither usurious, nor within the prohibition of the stock-jobbing act, 7 *Geo.* 2. *c.* 8.

Maddock v. *Rumball.* 8 E. R. 304

4. The defendant being indebted to the plaintiffs, his bankers, in nearly 30,000*l.*, about 21,000*l* of which was secured by bonds (a considerable part of which was advanced by them when stocks were below 50*l.*) agreed with them that they should place 25,000*l. to his credit in account;* for which he was to purchase 50,000*l.* stock (then at 51¼) in their names, and account to them for the dividends upon such stock as from the last dividend-day: after which agreement, the plaintiffs, acting upon the basis of it (though the defendant never purchased the stock so agreed upon) *entered in their books* the sum of 25,000*l. to the credit* of the defendant, and continued to honour his drafts from time to time; crediting him also with other sums actually paid by him; and wrote off the amount of his bonds to his credit, and delivered them up to him.

Held that this agreement to repay *the new credit of* 25,000*l.* by the purchase of stock as at 50*l.*, when in fact it was more at the time of the agreement made, though it had been less when a considerable part of the money was actually advanced upon his general credit, was usurious and void: but that nevertheless the sum of 25,000*l.*, *credited* under that agreement by the plaintiffs *to the defendant in his banking account*, was to be reckoned against them upon balancing the account of debtor and creditor between them.

Boldero & al. v. *Jackson.* 11 E. R. 612

5. A memorandum indorsed on a bond, which was conditioned for the payment of 100*l.* by quarterly payments of 5*l.* each, and interest at 5*l. per cent.* "that at the end of each year *the year's interest due* was to be added "to the principal, and *then* the 20*l.* "received in the course of the year "was to be deducted, and the balance "to remain as principal," was held not to be usurious.

Le Grange v. *Hamilton.* 4 T. R. 613
Affirmed in *Cam. Scac.* 9 H. B. 144

6. Where it appeared to be the usage of country bankers in discounting bills to receive, over and above the common interest of 5*l. per cent.* for the time the bills had to run, the further sum of 5*s. per cent.* on the gross sum for commission; such charge was held to be legal. *Winch. q. t.* v. *Fenn, T.* 27G. 3. 2 T. R. 52. *n.*

7. *A.* being a banker in the country, discounts bills at four months for *B.* and takes the whole interest for the time they have to run; *B.* on being asked how he will have the money, directs part to be carried to his account, part to be paid in cash, and part by bills in *London*, some at three, some at seven, and some at thirty days sight; and held not to be an usurious transaction, since the surplus of interest taken by *A.* might be referrable to the expenses of remittance. *Hammett & al* v. *Yea, Bart.* 1 B & P. 144

8. But an agreement on discounting a bill, that the plaintiff should take in part payment another bill which had time to run as cash, although the full discount was taken, is usurious.

Parr v. *Eliason.* 1 E. R. 92

9. The acceptor of bill, dated 4th of *July*, and due 7th of *September*, taking a premium of 6*d.* in the pound from the indorsee and holder for payment of the bill on the 20th of *August* before it was due, is not guilty of usury; there being no loan or forbearance.

Barclay q. t. v. *Walmsley.* 4 E. R. 55

10 To make usury there must either be a direct loan, and a taking of more than legal interest for the forbearance of payment; or there must be some device for the purpose of concealing or evading the appearance of a loan and forbearance, when in truth it was such. *ib.*

11. The granter of an annuity having agreed with the grantee to redeem, drew a bill of exchange for 5000*l.* at three years, which the grantee discounted in the following manner: he took 4083*l.* 6*s.* 8*d.* as the amount of the purchase money and arrears, advanced 166*l.* 13*s.* 4*d.* to the grantor in cash, and took 750*l.* as interest for three years upon 5000*l.* Held that the transaction was usurious.

Marsh v. *Martindale.* 3 B. & P. 154

12 If a promissory note be given for repayment of a sum lent with usurious interest, and the note when due be taken up and another note substituted for it, the offence of usury is not thereby committed, nor is the penalty incurred, until the latter note is paid.

Maddock q. t. v. *Hammett.* 7 T.R. 184

13. *A.* lent B. 500*l.* and at the time of the loan it was agreed that the latter should give something more than legal interest as a compensation, but no particular sum was specified. After the execution of the deed *B.* gave *A.* 50*l.* and paid interest at the rate of 5 *per cent.* on the 500*l.* for five years, at the end of which time an action was brought against *A.* for usury: held, that the action was not barred by lapse of time, for that the loan was substantially for no more than 450*l.*, and consequently the interest at the rate of 5 *per cent.* on the 500*l.* received within the last year was usurious.

Scurry q. t. v. *Freeman.* 2 B. & P. 381

14. Upon a contract to forbear 600*l.* for a year, reserving interest at the rate of 5*l. per cent.* for which a premium was paid in the first instance, the usury is complete upon the lender's receiving any part of the growing interest within the year.

Wade q. t. v. *Wilson.* 1 E. R. 195

15. The contract may be laid as for a forbearance to *A.* alone, who was the real debtor, although *B.* had joined with him in the security given to the lender. *ib.*

16. If *A.* be indebted to *B.*, and *B.* to *C.*, and *C.* agree for an usurious consideration to accept *A.* for his debtor instead of *B.*; this may be laid to be for an usurious loan of so much from *C.* to *A.* *ib.*

17. If more than legal interest be taken for forbearance on a note given to *A.* by *B.* as a collateral security for money lent to *C.*, such money is well described to be forbearance of money lent by the defendant to *B.*

Manners q. t. v. *Postan.* 3 B. & P. 343

18. If *A.* for an usurious consideration give his promissory note to B., who transfers it to C. for a valuable consideration, without notice of the usury, and afterwards *A.* gives a bond to *C.* for the amount, the bond is valid.

Cuthbert v. *Haley.* 8 T. R. 390

19. But if *A.* had given *B.* his bond in consideration of such note, the bond would have been void. 8 T. R. 390

20. If a person discounts a bill, and pays for it the amount of the contents, deducting only legal interest, and on a subsequent day receives usurious interest under pretence of becoming guarantee for the acceptor, it is competent to declare on the sum first paid as the sum forborne. And it may be laid as forborne to the person who receives the money and indorses the bill to him, even supposing that that person, if sued on the bill, might recover over against the guarantee.

Lee q. t. v. *Cass.* 1. W, P. T. 511

21. A *bonâ fide* debt is not destroyed by being mingled with an usurious contract relating to it.

Gray v. *Fowler.* 1 H. B. 462

22. A bill of exchange payable to *A.* or order, which was legal in its inception, was by him indorsed to *B.* for an usurious consideration, who passed it to a third person for a valuable consideration, without notice of the usury, by whom it was paid to *B.*'s assignees after his bankruptcy, in satisfaction of a debt owing to the bankrupt's estate: held that the indorsement of *A.* to *B.* on an usurious account, did not avoid the bill in the hands of an innocent holder, by virtue of the statute of usury, and that *B.*'s assignees, being clothed with the rights of such innocent indorsee, were entitled to hold the bill against *A.* though as between *A.* and *B.* the security was void.

Parr v. *Eliason,* 1 E. R, 92

23. The statute 14 *G.* 3 c. 79, relates solely to securities on *land* in *Ireland* and the colonies; and therefore where *A.* contracted with B. for the sale of an estate in the *West Indies,* and it was agreed that part of the purchase-money should remain secured by the bond of *B.* and *C.*, and that bond was afterwards cancelled, and another executed in *England* by *B.* and *D.* reserving 6*l. per cent.* interest (in the same manner as the former one); such contract was held to be usurious.

Dewar v. *Span.* 3 T. R. 425

24. A *post-obit* bond is a security of a doubtful nature. 1 H. B. 95

25. The court of C. P. set aside a warrant of attorney and judgment given to secure a loan which was sworn to be usurious, in order to bring the question of usury before a jury; but refused to order a bill of exchange to be delivered up which had been given to procure the defendant's release out of execution on the judgment.

Edmonson v. *Popkin.* 1 B. & P. 270

26. Where usurious securities have been acted upon, and the money partly paid by the borrower, the court will not set aside a judgment and execution but upon the terms of the defendant repaying the principal and legal interest.

Hindle v. *O'Brien.* 1 W, P, T. 413

27. After usurious securities given for a loan have been destroyed by mutual consent, a promise by the borrower to repay the principal and legal interest is binding. *Barnes & al,* v. *Hedley & al.* 2 W. P. T. 184

W.

WAGER.

1. Mr. Justice *Buller* was strongly inclined to think, that the stat. 14. *G.* 3. c. 48. made *all wagers* void wherein the parties had no interest. 2 T. R. 616

2. But in general a wager is legal, if it be not an incitement to a breach of the peace or to immorality; or if it do not affect the feelings or interest of a third person, or expose him to ridicule, or libel him, or if it be not against sound policy. 3 T. R. 693

3. A wagering contract for 50 guineas, that the plaintiff would not marry within six years, is primâ facie in restraint of marriage, and therefore void; no circumstances appearing to shew that such restraint was prudent and proper in the particular instance.

Hartley v. *Rice.* 10 E. R. 22

4. A wager that *A.* had purchased a waggon of *B.* is not void at common law, nor prohibited by stat. 14. *G.* 3. *c.* 48.; and an action may be maintained upon it.
Good v. *Elliott.* 3 T. R. 693

5. A wager on a horse-race for less than 50*l.* cannot be recovered in an action; the stat. 13 *G.* 2. *c.* 19. § 2. having prohibited such races.
Johnson v. *Bann.* 4 T. R. 1

6. Nor a wager, though for more than 50*l.*, that the plaintiff could perform a certain journey in a post-chaise and pair of horses in a given time.
Ximenes v. *Jaques.* 6 T. R. 499

7. Nor a like wager, that a single horse should go from *A.* to *B.*, on the high road, sooner than one of two other horses to be placed at any distance their owner should please; these being transactions prohibited by statutes 16 *Car.* 1. *c.* 7. § 2. and 9 *Anne c.* 14. and not legalized by 13 *G.* 2. *c.* 19. or 18 *G.* 2. *c.* 34. which latter statutes relate to *boná fide* horse racing only.
Whaley v. *Pajot.* 2 B. & P. 51

8. No action will lie on a wager respecting the *mode of playing* an illegal game; and if such a cause be set down for trial the judge at *nisi prius* is justified in ordering it to be struck out of the paper.
Brown v. *Leeson.* 2 H. B. 43

9. A wager between two voters with respect to the event of an election of a member to serve in parliament laid before the poll began, is illegal.
Allen v. *Hearn.* 1 T. R. 56

10. *Qu.*—Whether a wager, that war would be declared against *France* within three months, is void?
Foster v. *Thackery, T.* 21 *G.* 3. *B R.* 1 T. R. 57, *n.*

11. A wager upon the event of a cause in the House of Lords or the courts of justice is void, if laid with a lord of parliament or judge.
Per Lord Mansfield.) 1 T. R. 60

12. The court will not try an action upon a wager on an abstract question of law or judicial practice, not arising out of circumstances really existing, in which the parties have a legal interest.
Henkin v. *Guerss.* 12 E. R. 247

13. A wager respecting the amount of any branch of the public revenue is illegal; because it leads to an improper discussion, and is contrary to sound policy. *Atherfold* v. *Beard.* 2T.R.610

14. And after verdict for the plaintiff in an action brought on such a wager, the court will arrest the judgment.
2 T. R. 610

15. For the same reasons an action will not lie on a promissory note given in payment of a wager on the amount of the hop duties.
Shirley v. *Sankey.* 2 B. &. P. 130

16. *A.* in consideration of 200 guineas, paid by *B.*, gave a bond for the payment of an annuity to the latter of 100 guineas, till the hop duties should amount to a certain sum; before this event had taken place *A.* brought an action to recover back the 210*l.* of *B.*: held, that the action was maintainable.
Tappenden v. *Randall.* 2 B. & P. 467

17. But in such action, being for money had and received, only the net sum without interest could be recovered. *ib.*

18. If a wager be deposited with a stakeholder, on the event of a battle to be fought by the parties laying the wager, and it be not paid over, though the battle be fought either party may recover from the stakeholder the sum deposited by him.
Cotton v. *Thurland.* 5 T. R. 405

19. It might perhaps be otherwise if the money has been paid over to the winner. (*Per Kenyon* C. J.) 5 T. R. 409

20. In a subsequent case, the court of K. B. held that whenever money has been paid upon an illegal consideration it may be recovered back by the party who has improperly paid it, and that therefore where the plaintiff had given the defendant 100*l.* to receive 300*l.* in case of a peace within a certain time, he might recover back his 100*l.* though after the event of the wager was decided, by which if the wager had been legal he would have won his 300*l.* *Lacaussade* v. *White.*7T.R.535

21. But where money deposited on an illegal wager had been paid over to the winner by the consent of the loser; that court held that the latter could not afterwards maintain an action against the former to recover back his deposit. *Howson* v. *Hancock.*8T.R.575

WARRANTY.

1. Where a horse has been sold, *warranted sound*, which it can be clearly proved was unsound at the time of the sale, the seller is liable to an action on the warranty, without either the horse

being returned or notice given of the unsoundness.

Fielder v. *Starkin.* 1 H. B. 17

2. But where on the sale of a horse there is an *express warranty* by the seller, that the horse is sound, free from vice, &c. coupled with an undertaking on the part of the seller to take the horse again, and pay back the money, if *on trial* he shall be found to have any of the defects mentioned in the warranty, the buyer must in such case return the horse as soon as he discovers any of those defects, in order to maintain an action on the warranty, unless he has been induced to prolong the trial by any subsequent misrepresentation of the seller.

Adam v. *Richards.* 2 H. B. 573

3. In such case *trial* means a reasonable trial. *ib.*

4. Upon a warranty of a horse as sound, the vendor, in a subsequent conversation, promised if the horse were unsound (which he denied) he would take it again, and return the money; though the horse be unsound, the vendee must sue upon the warranty, and cannot maintain assumpsit to recover back the price, for such promise did not discharge the original warranty. *Payne* v. *Whale.* 7 E. R. 274

5. If a horse sold at a public auction be warranted sound, and six years old, and it be one of the conditions of sale that he shall be deemed *sound* unless returned in two days, this condition applies only to the warranty of *soundness.*

Buchanan v. *Parnshaw.* 2 T. R. 745

6. Therefore where a horse sold with such a warranty was discovered to be twelve years old ten days after the sale, and was then offered to the seller who refused to take him, it was holden that an action might be maintained by the buyer against the seller on the warranty, and his right to recover is not affected by his having sold the horse after offering him to the defendant. 2 T. R. 745

7. Upon the breach of the warranty of a horse, if the horse is returned, the measure of damages is the price paid for him. If the horse is not returned, the measure of damages is the difference between his real value and the price given. If the horse is not tendered to the defendant, the plaintiff can recover no damages for the expense of his keep. *Caswell* v. *Coare.* 1 W. P. T. 566

8. In an action on a bill given for the price of a horse sold under a warranty, the breach of the warranty is an answer to the plaintiff's demand on the bill if the defendant has tendered back the horse, although the plaintiff did not accept it.

Lewis v. *Cosgrave.* 2 W. P. T. 2

9. Upon a declaration in case, alledging a deceit to have been effected upon the plaintiff by means of a warranty made by two defendants, upon a *joint sale* to him by both, of sheep, their *joint* property, the plaintiff cannot recover upon proof of a contract of sale and warranty by one only, as of his separate property; the action, though laid in tort, being founded on the *joint* contract alledged.

Weal v. *King.* 12 E. R. 452

WASTE.

1. There is a distinction to be taken between waste and destruction, in conformity to the practice of the Court of Chancery. *Pyne* v. *Dor.* 1 T. R. 56

2. Tenant for life without impeachment of waste has an absolute property in trees as soon as they are cut down. (See TROVER 8.) 1 T. R. 55

3. The clause "without impeachment of waste" will not warrant a tenant for life in unleading a house and pulling down the tiles.

Vane v. *Barnard* (*Lord*) 1 T. R. 55, *n.*

4. The Court of Chancery have also prevented a tenant for life *without impeachment of waste* from cutting down an avenue leading to a house, but not all ornamental timber. 1 T. R. 55, *n.*

5. But in the case of Sir *Herbert Packington* (3 *Atk.* 215) a court of equity protected trees which were either an ornament or a shelter to a house. 1 T. R. 55, *n.*

6. In *Charlton* v. *Charlton*, mentioned by Lord *Hardwicke* in 3 *Atk.* 216, Lord Ch. *King* prevented a tenant for life without impeachment of waste from felling trees in a park. 1 T. R. 55, *n.* (*b.*)

7. One of two tenants in common, cannot maintain an action on the case in nature of waste, against the other tenant in common, (in possession of the whole, having a demise of the moiety from the first), for cutting down trees of a proper age and growth, for being cut; but he will be entitled to recover a moiety of the value in another form of action.

Martyn v. *Knowllys.* 8 T. R. 145

8. *Aliter*, if the trees be not fit to cut. *ib.*

9. If trees be excepted out of a demise, *waste* cannot be committed by cutting them down; and therefore ejectment cannot be brought as for waste committed in or upon the demised premises. *Goodright* v. *Vivian* 8 E. R. 19.

10. The purchaser of lands, having brought an ejectment against the tenant from year to year, the parties enter into an agreement that judgment shall be signed for the plaintiff, with a stay of execution till a given period. The tenant cannot in the interval remove buildings, &c. (*ex gr.* a wooden stable moveable on blocks or rollers), for the premises which he had himself erected during his term, and before the action was brought.

Fitzherbert v. *Shaw*. 1 H. B. 258

11. Salt pans, necessary to the use of salt works, and without which they would be of no value, are the property of the *heir*, and not of the *executor*; though they might be removed without injuring the buildings. *Lairton* v. *Salmon*. 22 *Geo*. 3. *B. R* 1 H.B. 259, *n*.

12. A tenant in agriculture, who erected at his own expense, and for the more necessary and convenient occupation of his farm, a beast-house, carpenter's shop, cart-house, pump-house, and fold yard wall, which buildings were of brick and mortar, and tiled, and let into the ground, cannot remove the same, though during his term, and though he thereby left the premises in the same state as when he entered. There appears to be a distinction between annexations to the freehold of that nature for the purposes of trade, and those made for the purposes of agriculture and better enjoying the immediate profits of the land in favour of the tenant's right to remove the former: that is, where the superincumbent building is erected as a mere accessary to a personal chattel, as an engine: but where it is accessary to the realty, it can in no case be removed.

Elwes v. *Maw*. 3 E. R. 38

13. In an action of waste, on the statute of *Glocester*, against tenant for years for converting three closes of meadow into garden ground, if the jury give only one farthing damages for each close, the court will permit the defendant to enter up judgment for himself. *The Keepers and Governors, &c. of Harrow School* v. *Alderton*. 2B.&P.86

14. An action on the case does not lie for permissive waste only.

Gibson v. *Wells*. N. R. 290

WAY.

1. Under the grant of a free and convenient way for the purpose of carrying coals (among other things), the grantee has a right to lay a framed waggonway. *Senhouse* v. *Christian*. 1 T.R.560

2. Under a grant of a way from *A*. to *B*. *in, through, and along* a particular way, the grantee is not justified in making a transverse road *across* the same. 1 T. R. 560

3. One being seized in fee of the adjoining closes *A*. and B., over the former of which, a way had immemorially been used to the latter, devises *B*. with the "appurtenances:" the court of C. P. held, that the devisee cannot under the word, "appurtenances" claim a right of way over *A*. to B., as no new right of way is thereby created, and the old one was extinguished by the unity of seisin in the devisor.

Whalley v. *Thompson*. 1 B. & P. 371

4. Where one (even as trustee) conveys land to another, to which there is no access but over the grantor's land, a right of way passes of necessity as incidental to the grant.

Howton v. *Frearson*. 8 T. R. 50

5. If the owner of two closes having no way to one of them but over the other, part with the latter without reserving the way, it will be reserved for him by operation of law. *Semble*. 8 T. R. 50

6. A claim of a prescriptive right of way from *A*. over the defendant's close unto *D*. is not supported by proof that a close called *C*., over which the way once led, and which adjoins to *D*. was formerly possessed by the owner of close *A*., and was by him conveyed in fee to another, without reserving the right of way; for hereby it appears that the prescriptive right of way does not, as claimed, extend unto *D*., but stops short at *C*.—*Quere*, if the claim had been for a prescriptive right of way over the defendant's close *towards D*.

Wright v. *Rattray*. 1 E. R. 377

7. But where in trespass *qu. cl. fr.* the defendant prescribed for an occupation way *from* his own close "unto, through, and over" the *locus in quo to and unto* a certain highway, &c. such pleas may be sustained, though it ap-

peared that one out of several intervening closes was in the possession of the defendant himself. *Jackson* v. *Shillito*, *Trin.* 32 *Geo.* 3. *C. B.* (cited) *ib.* 381

8. One who has a grant of an occupation way may declare in case, against the owner of the land over which the way leads, for obstructing it, although it be proved that the public in general had used the way without denial for the last 12 years.
Allen v. *Ormond.* 8 E. R. 4

9. The terminus ad quem, being laid to be a *public highway*, is proved by evidence of a *public footway*, though such description of the terminus might have been bad on special demurrer, as not being sufficiently certain. *ib.*

10. The owners of land suffering the public to have the free passage of a street in *London*, though not a thoroughfare, for eight years, without any impediment, such as a bar shut at times to denote the limited dereliction of the soil for the purpose, is sufficient for presuming a general dereliction of it to the public: and six years has been held sufficient.
Rugby Charity v. *Merryweather.*
(cited) 11 E. R. 376

11. But if the land had been out in lease all the time, or even for much longer, the acquiescence of the tenant would not, it seems, have bound the landlord, without evidence of his knowledge sufficient to presume a grant from him. 11 E. R. 376

12. Where no evidence appeared to shew that a way over another's land had been used by leave or favour, or under a mistake of an award which would not support the right of way claimed, such a user for above twenty years exercised adversely and under a claim of right is sufficient to leave to the jury to presume a grant which must have been made within twenty-six years, as all former ways were at that time extinguished by the operation of an inclosure act. *Campbell* v. *Wilson.* 3 E.R.294

13. *A.* and *B.* being severally seised of parcels of woody ground; and *B.* having other lands adjoining to his woody ground, and intending to make a colliery under his ground; *A.* grants to *B*, *his heirs and assigns*, liberty for *him*, *his heirs and assigns*, to carry up a sough or drain through *A.*'s woody ground into *B.*'s woody ground, and *also* liberty for *B.*, *his heirs and assigns*, to make *two* little sough pits in *A.*'s woody ground, for the more easy and safe carrying up the tail of the sough, one of which was to be covered in *as soon as conveniently might be after making the sough*, and the other to be kept open for examining the sough *so long as was necessary for that purpose and no longer*: and *B.* covenanted that he, *his heirs and assigns*, would not damage the trees growing on *A.*'s woody ground, nor get any of the coals under it, except what should arise in the drift of the intended sough; and that *A.*, *his heirs and assigns*, *from time to time, and at all times after*, might go down into any pit or pits of *B.*, his heirs or assigns, to discover whether any coals of *A.*, his heirs or assigns, should be gotten; and that B., *his heirs and assigns*, should *repair* any injury to *A.*'s fence, &c.: the court of K. B. held that by the grant to *B.*, *his heirs*, &c. of *the liberty of making the sough in A.'s land*, the liberty of making *sough pits* at any time afterwards, while the object of the grant remained, *being necessary for the purpose of repairing* the *sough*, passed as *incident* thereto: and that the use of such sough, for the carrying up of which into *B.*'s woody ground liberty was granted, was not confined to the getting of coals under *B.*'s woody ground, but extended also to the adjoining lands of *B*; and that the liberty of making new sough pits for necessary repairs of the sough, after the two original sough pits had been covered up by mutual consent, was not controlled by the special liberty given for making such original sough pits, the uses of which were limited by the grant; it appearing upon the face of it that the grant of the sough was intended to have continuing operation while any coals in *B.*'s woody ground and adjoining lands remained to be gotten.
Hodgson v. *Field.* 7 E. R. 613

14. *A.* granted to *B.*, his heirs and assigns, occupiers of certain houses abutting on a piece of land about 11 feet wide, which divided those houses from a house then belonging to *A.*, the right of using the said piece of land as a foot or carriage way; and gave him "all other liberties, powers, and authorities, incident or appurtenant, "needful or necessary, to the use, "occupation, or enjoyment of the "said road, way, or passage:" the

court of C. P. held, that under these words *B.* had a right to put down a flag-stone in this piece of land in front of a door opened by him out of his house into this piece of land.

Gerrard v. *Cooke.* 2 N. R. 109.

15. *A.* granted to B. land of unequal width, described as abutting on a road on his own soil. It abutted in the broadest part on the road, but in the narrowest part a narrow strip of the grantor's land intervened between the road and the premises granted. Held that the grantor and those claiming from him were concluded from preventing the grantee to come out into the road over this slip of land.

Roberts v. *Karr.* 1 W. P. T. 495

16. Evidence of a prescriptive right of way for all manner of carriages, does not necessarily prove a right of way for all manner of cattle.

Ballard v. *Dyson.* 1 W. P. T. 279

17. But it is evidence of a drift way, for the jury to consider, together with the other evidence. 1 W. P. T. 279

18. The extent of the usage is evidence of a right only commensurate with the user. 1 W. P. T. 279

19. An order made by justices of peace, under the stat. 13 *Geo.* 3. c. 78. § 19. for stopping up an old foot-way, and setting out a new one, must follow the form prescribed in the schedule annexed to the act, and set forth the length and breadth of the new foot-way, otherwise it is no answer to a justification of a right of way pleaded to an action of trespass, *quare clausum fregit*, brought by the owner of the soil over which the old way led. The statute requires that the form set forth in the schedule "*shall be* used on all occasions, with such additions and variations *only* as may be necessary to adapt it to the particular exigency of the case." Under these words a material variance from the form prescribed is fatal, and may be taken advantage of in a collateral proceeding.

Davidson v. *Gill.* 1 E. R. 64

WEIGHTS AND MEASURES.

1. It is illegal to sell corn by any other than the *Winchester* measure.

R. v. *J. Major.* 4 T. R. 750

2. The buyer of corn by any other than the *Winchester* measure forfeits the penalty of 40*s.* besides the value of the corn, by statute 22 & 23 *Car.* 2. c. 12. *R.* v. *J. Arnold.* 5 T. R. 353

3. If the *reddendum* in an old renewed lease be so many *quarters* of corn, it will be understood to mean legal quarters, reckoning the bushel at eight gallons; although the old leases before the stat. 22 & 23 *Car.* 2. c. 12. contained the same *reddendum*; and although, till lately, the lessees paid by composition, reckoning the bushel at nine gallons. *The Master and brethren of the Hospital of St. Cross*, v. Lord *Howard de Walden.* 6 T. R. 338

WILL.

1. Instructions for a will taken in writing by another in the presence and from the oral dictation of the deceased, though without any signature or attestation, is a will in *writing* within the stat. of wills, and complies with the terms of a surrender, directed to be to such uses, as A. B. *in or by her last will and testament in writing should limit, &c. Doe d. Cook & Ux.* v. *Danvers.* 7 E. R. 299, 324

2. If a testator, after having made his will, levy a fine to such uses as he shall by deed or will appoint, and die without making any new will, the will made prior to the fine is revoked thereby.

Doe d. Dilnot v. *Dilnot.* 2 N. R. 401

3. It is not necessary to the validity of the execution of a will of lands by a blind man, that it should be read over to him in the presence of the attesting witnesses. *Longchamp d. Goodfellow* v. *Fish.* 2 N. R. 415

WITNESS.

I. *Competency; general Objections to, on Account of Interest, &c.*

1. In general a person is a competent witness, unless he be directly interested *in the event of the suit.*

Bent v. *Baker* (*in error.*) 3 T. R. 27 (And see 7 T. R. 62.)

2. And unless the verdict can be given in evidence by him in another suit.

Bell v. *Harwood.* 3 T. R. 308 (And see 7 T. R. 62.)

3. Therefore one underwriter may be a witness for another in an action on a policy subscribed by both. 3 T. R. 27

4. And if he is engaged to contribute to the defendant's costs, and has an action depending against himself on the same policy, and has joined as a plaintiff in a bill in equity for a discovery, he may be made a competent witness by the defendant's releasing

him from any contribution to the costs in law or in equity, and by an offer by himself and the defendant to pay the costs in equity, and dismiss the bill as to them. 3 T. R. 27

5. Where two persons joined in an assignment of a ship, one of them was permitted to prove that at the time of the assignment he had no interest in the vessel. 1 T. R. 301

6. *A.* having given a bond to *B.* for the payment of money, which, it is understood between them, is to be applied towards indemnifying *B.* from the expenses of an election in which *B.* is a candidate; in an action brought by *C.* against *D.* for money advanced and services performed, in supporting the interest of *B.* at the request of *D.*: *A. is not a competent witness on behalf of D.*

Trelawney v. *Thomas.* 1 H. B. 303

7. If a commoner prescribe, in right of a particular messuage, that the defendant shall, for his benefit, do a certain act which is beneficial to all the commoners, another commoner, who claims by a similar prescription in right of another tenement, and not by custom, is not a competent witness to prove the charge.

Anscomb v. *Shore.* 1 W. P. T. 261

8. In covenant for rent upon a lease by *A.* to *B.*, the point in issue was whether *C.* (whose title both admitted) demised first to *A.* or to another person; *C.* is a competent witness to prove the point in issue; for the verdict cannot be given in evidence in any action which may afterwards be brought either by or against him.

Bell v. *Harwood.* 3 T. R. 308

9. But if two persons are contending for the possession, who are to pay rent in different rights, there the landlord could not be admitted a witness to prove the demise in the ejectment.

Per Buller, J. 3 T. R. 308

10. Where *A.* rented a tenement of *C.*, who covenanted to reimburse him all the poor-rates; and *A.* afterwards underlet to *B.*: *A.* was held to be a competent witness to prove such letting to *B.*, upon an appeal.

R. v. *Woodlands* (*Inhab.*) 1 T. R. 262

11. If *A.* have received money from *B.* to pay to *C.*, and the question be, whether *A.* were the agent of *C.*: for that purpose *A.* may be called as a witness to prove the agency.

Ilderton v. *Atkinson.* 7 T. R. 480

12. So a captain of a ship who had borrowed money for the use of the ship of the plaintiffs, was held a competent witness to prove that fact in an action against the owners, whose defence was that he had borrowed it for his own use. *Evans* v. *Williams*, Sittings at *Guildhall* after *T.* 28 *G.* 3. *cor.* Lord *Kenyon.* 7 T. R. 481, *n.*

13. In an action on a policy of insurance on goods from *London* to *Emden*, where the ship was lost by putting into the *Texel*; the captain, as part owner of the ship, was admitted as a competent witness to prove that the ship originally sailed on the voyage insured by the direction of the owners of the goods, though not to prove that the deviation was justified by necessity.

De Symonds v. *De La Cour.* 2 N. R. 374

14. In order to render a witness incompetent, it is necessary to shew that he must derive a *certain* benefit from the determination of the cause one way or the other. 1 T. R. 164

15. The bare possibility of a witness being liable to an action in a certain event is no objection to his *competency.* 1 T. R. 163

16. But bail cannot be a witness for the principal. 1 T. R. 163

17. A co-obligor in a bond to the ordinary under stat. 23 & 24 *Car.* 2. *c.* 10. is a competent witness to prove a tender by the administratrix.

Carter v. *Pearce.* 1 T. R. 163

18. So a creditor of the administratrix is a good witness for the same purpose. *ib.* 164

19. If a plaintiff and a defendant are both willing that the plaintiff shall give evidence in the cause, he is an admissible witness on his oath; although he comes to defeat the claim of another plaintiff suing jointly with himself. *Norden* v. *Williamson & al.* 1 W. P. T. 378

20. In an action against a master for the negligence of his servant, the latter is not a competent witness to disprove the negligence without a release.

Green v. *The New River Company.* 4 T. R. 589

21. It was held that a person is not a competent witness to impeach a security which he has given, although he is not interested in the event of the suit. *Walton* v. *Shelly.* 1 T. R. 296

22. And on this ground where a bond was given in consideration of deliver-

ing up a promissory note, an indorser was not permitted to prove that the consideration of the note was usurious. 1 T. R. 206

23. But afterwards, on mature deliberation, the court solemnly determined against the rule laid down in *Walton* v. *Shelly:* and held that in an action by an indorsee of a bill of exchange against the acceptor, the latter might call the payee and indorser as a witness to prove that the bill was void in its creation.

Jordaine v. *Lashbrooke.* 7 T. R. 601

24. A person whose name was forged as drawer of a bill, was held not competent to disprove an indorsement on the bill made by the party who forged it, respecting the payment of interest upon that bill.

R. v. *Crocker.* 2 N. R. 87

25. In an action by the indorsee of a bill of exchange against the acceptor, the latter cannot call the drawer-indorser as a witness (because interested) to prove that the plaintiff had no right to recover upon the bill, having merely received it from the witness in trust to obtain payment of it from the acceptor on account of the witness.

Buckland v. *Tankard.* 5 T. R. 578

26. An indorser on a note, who has received money from the drawer to take it up, is a competent witness for the drawer, in an action against him by the indorser, to prove that he had satisfied the note; being either liable to the plaintiff on the note if the action were defeated, or to the defendant for money had and received if the action succeeded. And his being also liable in the latter case to compensate the defendant for the costs incurred in the action by such non-payment makes no difference.

Birt v. *Kershaw.* 2 E. R. 458

27. A certificated bankrupt is not a competent witness to prove the debt of the petitioning creditor, or any other fact necessary to support the commission. *Chapman* v. *Gardner,* 2 H. B. 279.—*S. P. Cross* v. *Fox, in note, ib.*—*S. P. Flower* v. *Herbert, in note.—ib.*

28. In a *qui tam* action on the statute of usury against the assignee of a bankrupt for taking usurious interest on a loan of money to the bankrupt before his bankruptcy, the bankrupt is not a competent witness to prove the offence, if he has not obtained his certificate, or repaid the money; notwithstanding he is ready to release to his assignees all benefit which may arise from the discharge of this debt in particular, and all claim to allowance and surplus in general; and notwithstanding the assignee has proved his demand for the money lent under the commission.

Masters q. t. v. *Drayton.* 2 T. R. 496

29. In an action for usury, the borrower of the money, who has paid the same, is a competent witness to prove the whole case.

Smith q. t. v. *Prager.* 7 T. R. 60

30. Whether it be an objection to the competency of a witness for the plaintiff in an action of bribery at an election for members to serve in parliament, that a similar action was pending against the witness himself for bribery at the same election, and an acknowledgment by him that if the defendant were convicted, he should avail himself, if necessary, of his having been the first discoverer to the present plaintiff? *Qu.*

Edwards v. *Evans.* 3 E. R. 451

31. It is now decided to be no objection.

Heward v. *Shipley.* 4 E. R. 180

32. But where the evidence given by such a witness of the defendant's bribery was by means of the defendant's *confession* of it to the witness; held, that the truth of the fact so confessed, as well as of the confession of such fact, was material for the consideration of the jury. *ib.*

33. The party interested in the testimony of a witness, who is objected to on account of his having been convicted of felony, and his imprisonment being unexpired, is entitled to insist on proof of such conviction by the record, though admitted by the witness himself. *R.* v. *Castell Careinion* (*Inhab.*) 8 E. R. 77

34. A witness admitting herself to have before sworn falsely upon the particular point, but attributing it to the persuasion of the defendant, is not an *incompetent* witness against him on an indictment for a conspiracy; but the objection goes strongly to her *credit.* *R.* v. *Teal.* 11 E. R. 309

35. Whether a person who is interested in the *question* put to him, though not in the event of the suit, be a competent witness? *Qu.* 1 T. R. 296

36. In some cases even an interested person is a competent witness from necessity, as where the interest arises after the plaintiff or defendant has an interest in his testimony. 3 T. R. 27

37. A person who is employed to sell goods, and is to have for himself whatever money he can procure for them beyond a stated sum, is to be considered as a broker, and is a competent witness to prove the contract between the seller and the buyer.

Benjamin v. *Porters.* 2 H B. 590

38. *A.* having brought an action against *B.*, the latter filed a bill in equity against him for a discovery and injunction, and for an account; to which *A.* having put in his answer, denying the allegations of *B*, which involved the merits of the suit at law, the injunction was dissolved: on which answer *B.* indicted *A.* for perjury; and the indictment and action coming on to be tried at the same assizes, the indictment standing first; held, that *B.* was a competent witness to prove the perjury, as he could not avail himself of the conviction of *A.* in any civil proceeding between them either in law or equity. *R.* v. *Boston.* 4 E. R. 572

39. Equity refused leave to file a supplemental bill in nature of a bill of review, in consequence of a conviction of a witness in the original proceeding for perjury, which conviction was obtained on the evidence of the plaintiff in the suit as well as of others.

Bartlett v. *Pickersgill, Tr.* 32 & 33 *G.* 2. in Chancery, (cited.) *ib.*

II. *Attorney, Counsel, &c.; of their being Witnesses.*

1. An attorney is not restrained by any rule of law from giving evidence of a conversation between him and his client touching the justice of his suit, after a writ of inquiry executed on an interlocutory judgment, and a compromise thereupon; for the purpose of the suit having been obtained, the communication could not be said to have been made by way of instruction for conducting his cause.

Cobden v. *Kendrick.* 4 T. R. 431

2. But if any matter be disclosed to an attorney in the cause, pending the cause, he is not permitted to give it in evidence either in that or in any other action. *Wilson* v. *Rastal.* 4 T. R. 753

3. It is the privilege of the client and not of the attorney. 4 T. R. 753

4. But such privilege is confined to counsel, solicitors, and attornies, when acting in their respective characters. 4 T. R. 753

5. An attorney is bound to disclose the contents of a notice which he received to produce a paper in the hands of his client, the privilege of the client only extending to exclude the disclosure of any fact communicated confidentially to the attorney from his client, and not to adverse proceedings communicated to him as attorney in the cause from the adverse party. *Spenceley q. t.* v. *Schulenbey.* 7 E. R. 357

6. If several be charged with the same offence, and no evidence be given on the part of the prosecution against one of them, he is entitled to an acquittal before the others are called upon for their defence, in order to enable them to avail themselves of his testimony as a witness. Ship *Bounty*, Case of. (cited) 1 E. R. 313

III. *Husband and Wife.*

1. Husband and wife shall not be called in any case to give evidence, even *tending to criminate each other.*

R. v. *Cliviger* (*Inhab.*) 2 T. R. 263

2. Nor can they in any case be witnesses either for or against each other.

Davis v. *Dinwoody.* 4 T. R. 678

3. In a case of settlement where a marriage in fact had been proved between two paupers, the first wife of the husband is not a competent witness to prove a former marriage with him, because such evidence shews him to have been guilty of bigamy. 2 T. R. 263

4. Husband and wife may prove their own marriage on a question of settlement. 2 T. R. 263

5. A woman cannot give evidence of the non-access of her husband, to bastardize her issue, though he be dead at the time of her examination as a witness: and therefore an order of sessions, stated by that court to be founded in part upon credence given to her testimony of that fact, was quashed.

R. v. *Kea* (*Inhab.*) 11 E. R. 132

IV. *Parishioners, &c.*

1. On an appeal against a poor-rate because certain persons were omitted to be rated, a parishioner, who is liable to be rated, but not in fact rated, is a competent witness to prove the rateability of the appellants.

R. T. Prosser. 4 T. R. 17

2. A parishioner having rateable property in the parish, but omitted to be rated for the purpose of making him a witness upon a question of settlement between two parishes, is a competent witness for the parish in which he is so liable to be rated.
R. v. *Kirdford* (*Inhab.*) 2 E. R. 559
3. So such an one is a good witness to extend the boundries of his parish on a question of boundary between two adjoining parishes.. *Deacon* v. *Cook*, *Taunton*, Sp. Ass. 1789, (cited) *ib.* 562
4. *Aliter*, if he were actually rated at the time. *ib.*
5. So a person having rateable property in a parish, but not rated in fact, is a competent witness in a case respecting the settlement of a pauper in that parish. *B.* v. *South Lynn*, (*inhab.*) 5 T. R. 667—6 T. R. 157
6. And on an appeal between the parishes of *A.* and *B* the former may call an inhabitant of the latter who is not rated to the poor, and *compel* him to be examined as a witness. *R.* v. *Little Lumley* (*Inhab.*) 6 T. R. 157
7. Upon a question of settlement between two parishes, a parishioner of one of them having property there which is rated, though not in his own but in his son's name, for the purpose of making such parishioner a witness, is nevertheless incompetent to prove the settlement in the other parish.
R. v. *Killerby* (*Inhab.*) 10 E. R. 292
8. A rated inhabitant of a parish is to be considered as a party to an appeal between his parish and another, touching the settlement of a pauper; although the nominal parties be the churchwardens and overseers of the poor of the respective parishes; and being as such party directly interested in the event of that proceeding, he cannot be compelled to give evidence by the adverse parish even since the stat. 46 *G.* 3. *c.* 37., not being within the words or meaning of that law.
R. v. *Inhab. of Woburn*. 10 E. R. 395
9. Persons appointed by statute to be governors and directors of the poor of a certain parish, and made liable upon appeal against a rate made by them to the payment of costs in case the sessions should award any to the appellant, cannot be witnesses on such appeal; though in truth only trustees, and entitled to be reimbursed such costs out of the parochial fund; for they are parties to the cause, and liable to the costs in the first instance.
R. v. *Bermondsey* (*Poor Corp.*) 8 E. R. 7
10. Yet a tenant who was rated to the poor rate, being indemnified by his landlord, was holden a competent witness on behalf of the parish in which he was a payer, in a question of settlement. *R.* v. *Woodland*, *M.* 26 *G.* 3. 3 E. R. 11, *n.*
11. By stat. 27 *G.* 3. *c.* 29. parishioners are made competent witnesses in prosecutions where the penalty is given to the parish, unless it exceed 20*l.*
R. v. *Davis*. 6 T. R. 177
12. A corporation being lord of a manor, and having approved part of a common and leased it, a freeman is not a competent witness to prove that a sufficiency of common was left for the commoners.
Burton v. *Hide*. 5 T. R. 174

V. *Subscribing Witnesses.*

1. If the subscribing witness to a bond be interested therein as well at the time of the attestation as at the trial, he cannot be examined as a witness to prove the execution; nor is proof of his hand-writing sufficient for that purpose. *Swire* v. *Bell*. 5 T. R. 371
2. But the hand-writing of the obligor having been proved, the court refused to set aside a verdict given for the plaintiff. 5 T. R. 371
3. Where a subscribing witness is appointed executor to the obligee, proof of the hand-writing of the former may be given in an action on the bond.
5 T. R. 372
4. A bond having been executed by *A.*, and attested by one witness, was carried into an adjoining room and shewn to *B.*, who was desired to attest it also, which he accordingly did in the presence of *A.*: held, that *B.* was a good witness to prove the execution.
Parke v. *Mears*. 2 B. & P. 217
5. If an attesting witness appears upon search made at the admiralty to be serving in the navy his absence is sufficiently accounted for to render secondary evidence admissible.
Parker v. *Hoskins*. 2 W. P. T. 223

VI. *Examination of.*

1. Formerly the rule was to object to the competency of a witness before he was sworn in chief; but still the objection must be made at the trial. 1 T. R. 717
2. A witness may be asked whether he has not been in the pillory for perjury.
R. v. *Edwards*. 4 T. R. 440

3. A witness cannot be cross-examined, as to any distinct collateral fact not relevant to the matter in issue, for the purpose of disproving the truth of the expected answer by other witnesses, in order to discredit the whole of this testimony.
Spencel y q. t. v. *Willott.* 7 E. R. 108
4. A witness may refresh his memory by *any* book or paper, if he can afterwards swear to the fact from his own recollection; but if he cannot swear to the fact from recollection any farther than in finding it entered in a book or paper, the *original* book or paper must be produced.
Doe d. Church v. *Perkins.* 3 T. R. 749
5. *A.*, captain of an *India* country trader, contracts in *India* with *B.* for a crew, according to the custom of the country; *A.* arrives in *England* with the crew, and then makes a voyage with them to the *West Indies* and back again. In an action by part of the crew for wages due on the *West India* voyage; it was held, on a motion for a *mandamus* to examine witnesses in *India*, that the cause of action did not arise *in India*, within 13 *G.* 3. *c.* 63. § 44.
Francisco v. *Gillmore.* 1 B. & P. 177

VII. *Summoning and compelling to appear.*

1. Under the stat. 1 *Jac.* 1. *c.* 15. § 10 & 11. it is not necessary, upon summoning a witness before commissioners of bankrupt to be examined touching the bankrupt's effects, to tender him the expenses of his journey before-hand; though if he be in fact without the means of taking the journey, it may be an excuse for not obeying the summons; and consequently a warrant issued by the commissioners on account of the non-attendance of such witness, without lawful impediment, authorizing his arrest for the purpose of examination, is legal. *Battie* v. *Gresley.* 8 E. R. 319
2. It lies on the party so summoned, having a lawful excuse for not attending, to prove the fact in an action of trespass and false imprisonment, brought by him for such arrest; admitting that an inability to bear the expense of the journey is a lawful impediment. 8 E. R. 319
3. Such warrant for the arrest of the witness, in order to examine him, may issue after his disobedience to the *first* summons. 8 E. R. 319
4. The propriety of granting such warrant, being an act of discretion, must be determined upon by the commissioners acting together at the time. And their order to their officer to make out the warrant must be taken to include their direction as to the persons to whom it is to be directed; but the mere act of signing the names of the commissioners to the warrant may be done by them separately. 8 E. R. 319
5. The writ of subpœna *duces tecum* is of compulsory obligation on a witness to produce papers thereby demanded which he has in his possession, and which he has no lawful or reasonable excuse for withholding; of the validity of which excuse the Court, and not the witness, is to judge. And in an action against a sheriff's bailiff for disobeying such writ, who having been subpœnaed, on a former action by the plaintiff against another, to produce the warrant under which he acted, had neglected so to do, whereby the plaintiff was nonsuited, his ability to produce the warrant and his want of just excuse for not producing it are sufficiently alledged by stating, that he could and might in obedience to the said writ of subpœna have produced at the trial the said warrant, and that he had no lawful or reasonable excuse or impediment to the contrary.
Amey v. *Long.* 9 E. R. 473
6. One who is subpœnaed as a witness and attends at the trial, but there refuses to give evidence unless his expenses are paid, and is thereupon not examined, may yet maintain assumpsit for his necessary expenses of attendance against the party who subpœnaed him. There was also evidence of a promise to pay the expenses at the time of serving the subpœna; which it was contended was waved by the subsequent refusal to be examined.
Hallet v. *Mears & al.* 13 E. R. 15

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TABLE

OF THE

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CONTAINED IN THE APPENDIX.

The following Table of Names of Cases contained in the Appendix, have for the more easy reference, been numbered in arithmetical progression, so that by inserting in writing in the general Index of Names, the figure annexed to each Case, in the following list, all the Names there will be easily added to the general Index, (e. g.) *in letter* A., *after* Aguilar *v.* Rodgers, *insert number* 1, *and it will refer to* Ahithol *v.* Beniditto, *one of the Cases contained in the Appendix.*

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THE END.

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A CHRONOLOGICAL TABLE

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APPENDIX.

In consequence of the long time employed in printing the present Edition, the following Cases have been published since the sheets in which they would otherwise have been inserted were dismissed from the press.—By inserting, in writing, *in the proper place in the page referred to, the Figure prefixed to each case, all the cases may in a few minutes be added to the Digest.—E. g. in page* 8, Div. V. *of title* ACTION ON THE CASE, *after the Case numbered* 8 *insert the Figure* 9, *which will refer to the additional Case in the Appendix. When a Figure has an asterisk prefixed to the number, the Case is to be inserted next after the Case so numbered in the Digest: thus the Case marked* AFFIDAVIT, *pa.* 12, I. *11, is to be inserted next after number* 11, *of* Div. I. *of Title* AFFIDAVIT, *in Page* 12.

ACTION ON THE CASE.

[*Page* 5. II.]

*10. *A.* placed lime-rubbish in a highway; the dust blown from it frightened the horse of *B.* and nearly carried him into contact with a passing waggon, in avoiding which, he unskilfully drove over other rubbish placed in the road by *C.* and was overthrown and hurt; held that, upon a count stating these facts, *B.* could not recover against *A.*

Flower v. *Adam.* 3 W. P. T. 314

[*Page* 8. V.]

9. *A.* being desirous of disposing to *B.* of his buildings and stock in the trade in which he was engaged with *B.* pending a treaty between them, *B.* represented that he was about to enter into partnership with certain other persons, whom he did not name, but who he said would not consent to his giving more than a certain sum although this representation was false, and though *B.* in fact charged his future partners with a larger price than he gave; yet the Court of K. B. held that an action on the case did not lie, for this deceit, being a mere false representation of the intention of a third person, or at most a gratis dictum of the bidder, on which it was the folly of the seller to rely; and the declaration was also bad, in not shewing that *A.* was in fact damaged by such false representation.

Vernon v. *Keys.* 12 E. R. 632

AFFIDAVIT.

[*Page* 12. I.]

*11. A defendant cannot be held to bail on an affidavit stating him to be indebted to the plaintiff in so much for goods *bargained and sold*, without alledging that they were *delivered*.

Hopkins v. *Vaughan.* 12 E. R. 398

[*Page* 17. III.]

20. Affidavits intitled in K. B. and sworn before a commissioner (not stating him to be a commissioner of the court) cannot be read; but affidavits sworn in court, or before a judge of the court, though not intitled, may be read. *R.* v. *Hare.* 13 E. R. 189

[*Page* 18. V.]

8. One against whom articles of the peace are exhibited is not entitled to read affidavits in his behalf to contradict the facts sworn to against him in such articles, and prevent his giving security. *R.* v. *Doherty.* 13 E. R. 171

AGENT.

[*Page* 20. II.]

14. A share in the London Institution, incorporated by charter for the advancement of literature, &c. cannot be transferred until the proprietor shall, *by writing under his hand*, signify his desire so to do to the committee of managers, and mention therein *the name, &c.* and other description of the person to whom he is desirous the same should be transferred; which person is to be approved by the committee: held, that a note addressed to them in these words: "Having "disposed of my share in the London "Institution to [*leaving a blank for* "*the name*], I beg leave to recommend him to be elected in my place, "as a proprietor," &c. and signed by the proprietor, which note was left in the hands of an agent (the clerk of the society), for the purpose of selling the share, did not authorise such agent to fill up the blank himself with the name of the purchaser with whom he contracted for the price; against the rules of the society, which require the recommendation of the candidate to be vouched by the proprietor himself, inserting his name, &c. in the paper. and consequently the agent had no authority, before the transfer was so completed, to receive the money of the purchaser and to insert his name in the blank unknown to the proprietor. And such purchaser paying the money before the time of payment when the transfer from the proprietor was complete, pays it at his own risk to the agent, whom he thereby makes his own for that purpose. And such agent afterwards absconding with the money, and the society disallowing the transfer, upon the interference of the proprietor, the Court of K. B. held that the purchaser could not recover the amount from such proprietor in an action for money had and received.

Parnther v. *Gaitskell.* 13 E. R. 432

15. The plaintiff and the defendant having each lodged their respective India Bonds with the same bankers, who afterwards privily and without the defendant's authority sold his bonds, and upon his demand of them delivered up to him the *India* bonds of the plaintiff to the same total amount, and payable to the same obligee, (being always the treasurer of the company, who indorses such bonds in blank before they are circulated), but having different numbers and for different separate sums, and therefore manifestly distinguishable from his own bonds; though the defendant did not know that they were the property of another, but was told by the bankers that they had exchanged his original bonds for these: held, that the defendant, having sold the plaintiffs' bonds so received from his own agents, who had acted *malâ fide* in passing them to him, was liable to answer over to the plaintiffs, for the amount, in an action of *assumpsit* for money had and received to their use. *Glyn B. & al.* v. *Baker.* 13 E. R. 509

AGREEMENT.

[*Page* 22. I.]

16. *A.*, proprietor of a medicine, having assigned to *B.* his right and interest in making and vending it, reserving one third of the profits, *B.* assigns all his interest to *C.*, and *A.* by a subsequent deed releases to *C.* his interest in the one third reserved, and assigns all right and title to the medicine by words sufficient to convey the whole property in it. If *A.* is afterwards concerned with others in making and selling the same medicine on his own account, it is a breach of agreement for which an action for damages may be sustained.

Seddon v. *Senate.* 15 E. R. 63

17. *A. B. C.* and *D.* agreed to purchase a cargo of coals in certain proportions, to be severally taken and received out of the ship by them respectively, at the rate of forty chaldrons per day, and to settle their turns among themselves; and

further agreed, that in case of any loss or demurrage, by not fixing on their respective turns, or by subsequent detention in working out the cargo, to hold themselves severally and respectively liable for their several and respective defaults: at the rate of forty chaldrons per day, the whole cargo would have been cleared in nine days; but in consequence of one of the days being wet, only five chaldrons were taken out on that day; and on the 10th day, some of *A.*'s coals remained on board; held that working days only were within the meaning of the contract, and that as one day was wet, *A.* was not bound to pay demurrage for the 10th day.

Harper v. *M'Carthy & al.* 2 N.R. 258

ARREST.

[*Page* 43. V.]

6. If a defendant be arrested by a wrong *Christian* name, the Court will discharge him on motion. And the sheriff is liable to an action.

Wilks v. *Lorch.* 3 W. P. T. 399

7. But where there is only an inaccuracy in the spelling, so that the name is still *idem sonans*, the Court will not interfere.

Ahitbel v. *Beniditto.* 3 W. P. T. 401

ASSUMPSIT.

[*Page* 52. VI.]

42. No action on an implied assumpsit lies by the reversioner and owner of the inheritance to recover the value of timber, cut by the deceased, tenant for life, after a fine levied by her, whereby she acquired a base fee, and before the avoidance of such fine and base fee by the entry of the reversioner for that purpose: such entry not revesting the reversioner's old estate ***by relation during the continuance of the base fee*** thus created, so as to entitle him at law to the timber and other mesne profits taken during that interval. Even supposing that after the statute of limitations had run against the appropriate action, by the reversioner against the tenant for life, for mesne profits, or for waste, upon the original wrongful act of cutting down and converting the trees, an action of assumpsit for money had and received for the purchase money of the trees sold, which was in fact paid to the former tenant for life within six years, was maintainable against her representatives after her death.

Hughes v. *Thomas & al.* 13 E. R. 474

ATTORNEY.

[*Page* 57. II.]

7. An attorney who has ceased to practise after the passing of 5 *G.* 3. *c.* 80. and before the operation of 37 *G.* 3. *c.* 90. § 31. commenced, may be readmitted without paying any penalty or arrears of duty.

Ex parte Scrope. 3 W. P. T. 398

[*Page* 58. III.]

27. An attorney's bill for obtaining a bankrupt's certificate must be signed and delivered a month before he can sue thereon. *Collins & Waller* v. *Nicholson.* 3 W. P. T. 321

28. Obtaining the Lord Chancellor's signature is business done in a court.

3 W. P. T. 321

AWARD.

[*Page* 63. II.]

16. Where a cause involving a question of law was referred to a barrister under a rule of court to settle all matters in difference between the parties; and he made his award thereupon; but the question of law did not appear upon the face of the award; the court, considering that it was the intention of the parties to refer the decision of the merits, as well upon the matter of law as of fact, to the arbitrator, refused to open the award again, upon a suggestion of the arbitrator's mistake in point of law upon the construction of a contract between the parties.

Chace v. *Westmore.* 13 E. R. 357

23. If arbitrators have power to examine the parties in the cause, they may waive the objection taken to the competency of a witness that he has such an interest that he ought to have been made a party. And such witness may be examined by the arbitrators.

Lloyd v. *Archbowle* 3 W. P. T. 324

B.

BAIL.

[*Page* 69. III.]

12. For the purpose of fixing the bail on scire facias, the capias ad satisfaciendum against the principal must lie the *four last* days in the office before the return; and the bail having once been prepared to render their principal in time, which they then omitted to do, in consequence of a rule nisi taken out by them on the suggestion of the Court of K. B. with a view to an arrangement out of court between the parties (the principal being a lunatic), which rule was afterwards discharged without providing for the bail to be placed in the same situation that they were in before; the Court of K. B. in a subsequent term, permitted the bail to take the above objection to the regularity of the proceedings, though they had before, in the same term, before they were aware of this objection, brought forward another objection, which was overruled.

Cock v. *Brockhurst & al.* 13 E. R. 588

[*Page* 71. IV.]

34. The defendant being in custody of a messenger under an order of the Secretary of State for the purpose of being sent out of the kingdom by virtue of the alien act, 41 *G.* 3. *c.* 155., the Court of K. B. refused to issue a habeas corpus, on the application of his bail, to bring him up, that they might render him in their own discharge, on account of the public inconvenience, and probable risk of his passage, which had been taken in a ship immediately about to sail to his destined port. But they also refused, while he was still in the kingdom, and might possibly be set at large again, to enter an exoneretur on the bail-piece: but they said they would remember that the situation of the bail was without any fault of theirs, if any proceedings were taken against them in the mean time.

Folkein v. *Critico.* 13 E. R. 457

BANK NOTES.

[*Page* 74.]

The holder of a bank note is prima facie entitled to prompt payment of it, and cannot be affected by the previous fraud of any former holder in obtaining it, unless evidence be given to bring such fraud home to his privity.

Solomons v. *Bank of England.* *M.* 32. *G.* 3. *cited* 13 E. R. 135, *n.*

BANKRUPT.

[*Page* 76. I.]

29. If a trader keeps house, and causes himself to be denied to a tax gatherer, who calls for the taxes it is an act of bankruptcy.

Jeffs v. *Smith.* 3 W. P. T. 401

[*Page* 30. II.]

44. The assignees of a bankrupt cannot recover the amount of a check paid by the bankrupt's bankers after the bankruptcy, in trover for the check against the creditor, to whom the check was delivered and the money paid. *Mathew & al.* v. *Sherwell.* 3 W. P. T. 459

[*Page* 83. IV.]

37. Where, by agreement between plaintiffs, bankers at *C.* and defendants, bankers at *N.*, plaintiffs were weekly to send to defendants all their own notes, and the notes of certain other banking houses; and the defendants were in like manner to send their notes in return; and the deficiency was to be made up by a bill drawn by defendants in favour of plaintiffs at a certain date; held that the notes so sent by plaintiffs constituted a debt against defendants, and if they made no return, or a short return of their notes, and gave no bill for the balance, that balance was proveable under a commission of bankruptcy on an act of bankruptcy committed by defendants after the time when a bill for the balance, would if drawn have been done; and that therefore after certificate no action could be maintained by plaintiffs for the breach of the contract. *Forster & al.* v. *Surtees & al.* 12 E. R. 605

[*Page* 85. V.]

24. The plaintiff having accepted a bill, payable at a future day, for the accommodation of the defendant, the

latter afterwards, and before the bill became due, committed an act of bankruptcy, followed by a commission, which was afterwards superseded; and time was given to the bankrupt by his creditor; and the plaintiff thereupon accepted another bill for the same debt, with the addition of interest and stamp; the court of K. B. held that this was a continuation of the same suretyship by the plaintiff for the defendant, which existed before the act of bankruptcy and the first commission: and a second effectual commission having afterwards issued upon the same act of bankruptcy, before the plaintiff's second acceptance became due, which was paid when due; the court held that the amount was provable as a debt under such commission by virtue of the stat. 49 *Geo.* 3. *c.* 121. §. 8., and was consequently barred as a personal demand against the bankrupt by his certificate. *Stedman* v. *Mantinnant.* 13 E. R. 427

[*Page* 86. VII.]

13. Bills of exchange to the amount of 100*l.*, drawn and issued by a trader before an act of bankruptcy, but becoming due afterwards, are sufficient, when due, to found a petition for a commission of bankrupt against him. But note, the bankrupt was in fact indebted to different persons at the time of the act of bankruptcy in more than 100*l.*, even allowing the rebate of interest upon the bills, calculated back to that period.

Brett v. *Levett.* 13 E. R. 218

[*Page* 88. VIII.]

14. A trader after a commission of bankrupt wishing to redeem a bill of exchange remitted to his bankers, applied to them by an unknown agent, to take four other bills in exchange; on their refusal, such agent passed the four bills, and obtained bank notes for the same, with which he took up the bill in the usual way; the court of K. B. held that the assignees could not recover from the bankers the amount of such bank notes, the produce of the bills, which were part of the bankrupt's estate after his bankruptcy; such bank notes being received by the bankers bona fide for a valuable consideration and without notice of the true owners. *Lowndes & al.* v. *Anderson & al.* 13 E. R. 130

[*Page* 88. VIII.]

15. A trader having securities in his banker's hands, after a secret act of bankruptcy, drew on them a bill for a *larger* amount on the score of his accommodation, which after acceptance he indorsed to the plaintiff; the court of K. B. held that though the plaintiff was entitled to sue on the bill yet he could only recover against the acceptors, the amount of the sum accepted for the accommodation of the bankrupt beyond the amount of the securities in their hands; for which latter they were liable in another form of action to the assignees.

Willis v. *Freeman & al.* 12 E. R. 656

BILLS OF EXCHANGE.

[*Page* 100. II.]

25. The holder in *America* of two bills of the same tenor, having transmitted them to his agents here to present them for acceptance, and *receive* the money when due, and *pay over* a part of it to the plaintiff; while the bills so remained in his agents' hands, agreed with the defendant, the indorser, (who had lent his indorsement on each to the drawer, from whom the holder received them), that upon the payment of one of the bills he should be exonerated from both. In the mean time, the bills having been presented for acceptance by the agents and dishonoured; *after the dishonour*, the agents not knowing of such agreement between their principal and the indorser, assigned one of the dishonoured bills to the plaintiff, who was informed of the dishonour, and who received it liable to all its infirmities, but without notice of such agreement; the court of K. B. held, that the bill so received by the plaintiff was bound by the agreement; and that the defendant, having afterwards taken up and discharged the other bill, which had remained in the hands of the same agents, was discharged from both.

Crossley v. *Ham.* 13 E. R. 498

26. The indorsee of a bill of exchange, post-dated, &c. made payable 65 days after date, which was issued by the drawer, and indorsed by the payee, who died before the day when it bore date, may make title through such indorsement to recover on the bill against the drawer.

Pasmore v. *North.* 13 E. R. 5

[*Page* 105. VII.]

42. The indorsee of a promissory note may recover upon it against the payee and indorser, on evidence of a promise to pay it, made some time after the dishonour of the note by him to a subsequent indorsee, who then held it; without direct proof by the plaintiff, that due notice of the dishonour was given to such payee and indorser.
Potter v. *Rayworth*. 13 E. R. 417

43. Want of notice to a bankrupt drawer, of the dishonour of a bill, may be supplied by evidence of his acknowledgement to the holder, when asked if the bill would be paid, that it would not; though such acknowledgement were made after the act of bankruptcy committed. *Brett* v. *Levett*. 13 E. R. 213

44. Where defendant lent to the drawer of a promissory note payable on demand, his indorsement, to enable the drawer to raise money from plaintiffs who were bankers and agreed to advance money thereon for six months; held that the plaintiffs who renewed their advances after the six months, without the defendant's knowledge, could not recover on his indorsement, without proof of a demand on the drawer and regular notice of the dishonour to the defendant.
Smith & al. v. *Becket*. 13 E. R. 187

45. By the practice of the *London* bankers, if one banker, who holds a check drawn on another banker, presents it after four o'clock, it is not then paid, but a mark is put on it, to shew that the drawer has assets, and that it will be paid; and checks so marked have a priority, and are exchanged or paid next day at noon, at the clearing house: held, that a check presented after four, and so marked, and carried to the clearing-house next day, but not paid, no clerk from the drawee's house attending, need not be presented for payment at the banking-house of the drawee. *Robson & al.* v. *Bennett & al.* 3 W. P. T. 388

46. Such a marking under this practice amounts to an acceptance, payable next day at the clearing-house. *ib.*

47. It is not necessary to present for payment a check payable on demand, till the day following the day on which it is given. 3 W. P. T. 388

48. A person receiving a check on a banker is equally authorized, in lodging it with his own banker, to obtain payment, as he would be in paying it away in the course of trade. 3 W. P. T. 388

BILL OF SALE.

[*Page* 111.]

5. *A.* having 40 tons of oil in one cistern sold 10 tons to *B.* and received the price; and *B.* sold the same to *C.* and took his acceptance at four months and gave him a written order for delivery on *A.*, who indorsed his acceptance thereof on the order; but no other delivery of the 10 tons was made to *C.*; yet the Court of K. B. held that this was a complete sale, and delivery by *B.* to *C.* and that therefore *B.* could not countermand the delivery in fact; nor were the goods in transitu so as to be stopped by *B.*
Whitehouse & al. v. *Frost & al.* 12 E. R. 614

BOND.

[*Page* 113. III.]

12. If default be made in payment of the interest on a bond the principal whereof is not yet due, the Court will not stay proceedings on payment of the interest and costs.
Tighe v. *Crafton*. 3 W. P. T. 387

[*Page* 114. IV.]

6. Covenants to sink coal mines by a certain day, as far as could be accomplished, or in default, to pay so much to the lessor as should be awarded: on default a sum was awarded to the lessor for the time past, and an annual rent for the time to come, until such coal mines should be sunk; to an action on the bond it is a sufficient plea that the defendant paid the sum awarded, and that on trial there were no coal mines found fit to be worked.
Hanson v. *Boothman & al.* 13 E. R. 22

7. In debt, on bond conditioned not to assault, molest, or injure the person of the plaintiff, the replication alledging that defendant assaulted, &c. by beating and ill treating plaintiff was held a sufficient assignment of the breach of the condition for which the jury were to assess damage on stat. 8 & 9 *W.* 3. *c.* 11. § 8. though such breach were not alleged in formal terms, according to the statute.
Tombs v. *Painter*. 13 E. R. 1

C.

CERTIORARI.

[*Page* 119. I.]

16. The Court of K. B. refused a certiorari to remove an indictment for a misdemeanor, and proceedings thereon at the assizes, after conviction and before judgment, which was prayed for the purpose of applying for a new trial, on the Judge's report of the evidence, upon the ground of the verdict being against evidence and the Judge's direction. *R.* v. *Oxford* (*County*) *Inhab.* 13 E. R. 411

COMMON.

[*Page* 121. II.]

12. Where one of two adjoining commons, with common of vicinage, was enclosed and fenced off by the owner of the soil, leaving open only a passage sufficient for the highway which led over the one to the other; yet as the separation was not complete, so as to prevent the cattle straying from one to the other by means of the highway, the common by vicinage still continued. *Gullett* v. *Lopez, Bart.* 13 E. R. 348

CONVICTION.

[*Page* 124. II.]

21. A conviction under stat. 39, 40 *G.* 3. *c.* 106; 41 *G.* 3. *c.* 38, of a journeyman for refusing to work, held bad for want of stating that such refusal, was made within the jurisdiction of the convicting Magistrates.
R. v. *Hazell.* 13 E. R. 139

CORPORATION.

[*Page* 137. IV.]

26. A prescriptive right in persons of a definite description to be admitted burgesses of *Nottingham*, was held by the court of K. B not to exclude the incidental power arising by implication of law to the corporation at large, to secure their perpetual succession, by voluntary elections of burgesses *ad libitum*: and this, though it was averred that the place had always been and yet is a populous town, containing numerous resident and trading burgesses; and that by the prescriptive modes of supply by birth and servitude, the succession of a sufficient and large number of burgesses *is* fully secured; for non constat that these sources had *at all times* been sufficient during the existence of the corporation, without occasional supplies of burgesses by election, or even that they were so at the time of the election in question, and they could not have operated at all for some years after the creation of the corporation; and therefore, no presumption can be made from thence that the crown meant to exclude the incidental power of the corporation to make voluntary elections of burgesses in aid of such prescriptive modes of supply.
R. v. *Bird.* 13 E. R. 367

27. Whether the power of making such voluntary elections be incidental to the corporation at large, or exist in them by prescription; it is competent for them to delegate it to a select part of themselves, but not to any stranger; and the recorder of the town must be taken to be such, if he be not stated to be a burgess.
13 E. R. 367

28. As such select body is the creature of the corporation, its constitution and mode of acting may, it seems, be modelled (with the exception before stated) according to the pleasure of its maker. 13 E. R. 367

[*Page* 138. V.]

9. The highest bidder for certain lands sold by auction, and the Mayor of a corporation, on behalf of himself and the rest of the burgesses and commonalty of the borough, the vendors of the lands, signed a contract, in which they mutually promised to fulfil the conditions of sale on their respective parts. The conditions stated the the title of the corporation to the premises, and stipulated that they should convey, and might re-sell on default. The only act therein mentioned to be done by the plaintiff, was the receiving the deposit. Held, that the plaintiff could not, in his individual capacity, maintain an action against the purchaser for breach of this contract.
Bowen v. *Morris.* 3 W. P. T. 374

COSTS.

[*Page* 145. VII.]

12. Generally if money be paid into court, and the plaintiff does not take it out, but proceeds to trial, and recovers nothing, he is not entitled to costs up to the time of paying the money into court; but in policy-causes, where there is a consolidation-rule, and money paid into court, although the cause tried follows the general practice, and the defendant, if he succeeds, is entitled to the whole costs of that action, yet the plaintiff is entitled to the entire costs of the short causes up to the time of paying the money into court.
Twemlow v. *Brock*. 3 W. P. T. 361

[*Page* 147. VIII.]

32. Where on removing an indictment from the sessions, by *certiorari*, a recognisance is given by two in 20*l*. each, under stat. 5 *W. & M. c.* 11. § 2, 3. to secure the costs, such recognizance shall not be discharged till all costs are paid, though they exceed 40*l*.
R. v. *Teal & al.* 13 E. R. 4

33. A commission of bankrupt having issued against the plaintiff who was going with his family to *New York*, upon the petition of the defendant, who was the only creditor, and had chosen himself sole assignee, and the plaintiff having brought an action against the defendant to try the commission, the court refused to stay the proceedings till he should give security for the costs.
M'Cullock v. *Robinson*. 2 N. R. 352

[*Page* 148. IX.]

33. Where plaintiff after arresting and holding defendant to bail for 50*l*. took 20*l* out of court, and stayed further proceedings; the defendant was not held entitled to costs under 43 *G.* 3. *c.* 46 § 3.
Rouveroy v. *Alefson*. 13 E. R. 90

COVENANT.

[*Page* 155. IV.]

5. Defendant having covenanted to pay plaintiff 300*l*. in 12 months, with interest, in the mean time it is no answer to an action of defendant for the 300*l*. and interest, to plead a covenant in the same indenture that the defendant should pay the property tax in respect of the 300*l*.; for the plea does not shew that the covenant attached on the interest of that 300*l*.; and the covenants so exhibited appear to be independent; and, therefore, though the latter should be void (by 46 *G.* 3. *c.* 65 and 115), yet that will not avoid the other independent covenant for payment of the 300*l*. and interest.
Wigg & al. v. *Shuttelworth*. 13 E. R. 87

D.

DEVISE.

[*Page* 178. II.]

61. Under a devise of the residue of real and personal estate (subject to the payment of debts and and legacies) to the testator's son and daughter, *their heirs and assigns for ever, as tenants in common, and not as joint tenants;* but in case of the death of either, leaving child or children, the share of him or her so dying to go to his or her child or children; or if all should die before 21, such share to go to the survivor of the son or daughter for ever: but in case his son and daughter should be both dead *at the time of the testator's death*, without child or children; or leaving child or children, all of them should die under 21 and unmarried, and without child or children; then he gave the whole of his real and personal estate to his executors, upon certain trusts for other branches of his family; and then the will proceeded, as to the rest and residue of his estate and effects, *in case of the death of his son and daughter at the time before-mentioned, and without child or children, and other the events aforesaid*, he gave the same to his brother in fee: the Court of K. B. held that the limitation to the children of the deceased son or daughter, or to the survivor of the two, was only a substitution in case of a lapse by the death of the testator's son or daughter *in his lifetime;* so that if both son and daughter survived him, he intended them to take the fee as tenants in common; if one died in his life-time and left issue, such issue was to take the parent's share; or if there should be no such issue which should attain 21, the survivor of the son and daughter

should take the whole; or if both died in his life-time, and either left issue, such issue was to take; but if both died without issue in his life-time, then the executors were to take on the trusts mentioned; remainder to his brother in fee. *Doe, d. Lifford & ux.* v. *Sparrow.* 13 E. R. 359

[*Page* 178. II.]

62. Under a devise of land to certain persons described generally as "the sisters of J. H." their heirs, &c. *as tenants in common*, and not as joint tenants: it was held by the Court of K. B. that one of three sisters of J. H. who alone survived at the time of *the devise made*, and who also survived the testator, was entitled to take the whole. But even if she had been only entitled to a part, (whether a moiety or a third), the residue would not have gone to the heir at law of the testator as in case of a lapsed devise, which supposes the deceased legatees to have been once capable of taking under the will; but to the residuary legatee, to whom was devised certain other lands, "and also all other the testator's lands, &c. not hereinbefore disposed of, &c. and all other his real and personal estate whatsoever which he might be possessed of, or entitled to, &c."
Doe, d. Stewart, v. *Sheffield*. 13 E. R. 526

E.

EAST INDIA COMPANY.

[*Page* 198.]

3 Though the cause of action accrued within the jurisdiction of the Supreme Court at *Calcutta*, while both the parties were resident there, and by the king's charter, granted in pursuance of the stat. 13 *G.* 3. *c.* 63. that court is authorised to exercise the same jurisdiction in civil cases as is exercised by the court of K. B. within *England by the common law thereof*, and assuming that by such authority the provisions of the statute of limitation 21 *J.* 1. *c.* 16. § 7., and 4 *Ann. c.* 16. § 19. are transferred to *India*, as part of the law of *England*, auxiliary to the common law; yet by the express tenor of the savings in those statutes, as applicable to the courts here, the plaintiff's right of action upon an assumpsit is saved, if he (having returned home before the defendant) commence such action within six years after the defendant's return home, though more than six years had elapsed in *India* after the cause of action accrued there, and during the defendant's stay within the jurisdiction of the court in that country.
Williams v. *Jones*. 13 E. R. 439

EJECTMENT.

[*Page* 202. I.]

50. One who is put in possession upon an agreement for the purchase of land cannot be ousted by ejectment before his lawful possession is determined by demand of possession or otherwise; and even considering such lawful possession as a tenancy at will, the defendant's confession, (by entering into the common rule), of a lease by the lessor to the nominal plaintiff, is not a constructive determination of the will whereon to maintain the ejectment.
Right, d. Lewis, v. *Beard*. 13 E. R. 210

51. Where a defendant in ejectment shews by affidavit that he is coparcener, joint tenant, or tenant in common, and denies actual ouster, the court will permit him to confess lease and entry only, without confessing ouster.
Doe, d. Gigner v. *Roe*. 3 W. P. T. 397

[*Page* 203. II.]

12. An actual entry is necessary to avoid a fine, (i. e. a fine with proclamations;) and the lessor of the plaintiff bringing his ejectment upon such avoidance must lay his demise subsequent to such entry.
Berrington v. *Parkhurst*. 13 E. R. 489

EVIDENCE.

[*Page* 212. II.]

*10. An examined copy of the act-book in the registry of the prerogative court of *Canterbury*, stating that administration was granted to the defendant of her husband's goods at such a time, is proof of her being such administratrix, in an action against her as such, without giving her notice to produce the letters of administration.
Davies v. *Williams*, 13 E. R. 232

[*Page* 218. VI.]

18. An admission by a defendant that so much was agreed to be paid to the plaintiff for the sale of standing trees, made after the trees had been felled and taken away by the defendant, will support a count upon an account stated, though not for goods sold and delivered.

Knowles v. *Michel.* 13 E. R. 249

F.

FINE OF LANDS.

[*Page* 232.]

22. *R. D.* being tenant for 99 years determinable on his life; *remainder to trustees to preserve contingent remainders;* remainder to his first and other sons in tail male; with remainders over; it was questioned at first whether a fine levied by the tenant for years in possession, and his eldest son the first tenant in tail in remainder, was void against the remainder-man over, by reason that the trustees to preserve contingent remainders, in whom it was contended that a present freehold was vested during the life of the tenant for years, were no parties thereto: but it was held afterwards that the trustees had a vested, and not a contingent remainder; and that the present freehold interest was in them, to commence in possession upon the determination of the term of years by forfeiture or other means, during the life of tenant for years; and thereby that such fine was void against the remainder-man. Neither is the estate of such remainder-man over discontinued, or his right of entry within five years taken away by another fine levied by the daughters of the first tenant in tail male; who, upon his death, wrongfully entered and were possessed, and thereby disseised the remainder-man over.

Berrington v. *Parkhurst.* 13 E. R. 489

23. Affidavits of the acknowledgments of fines and recoveries taken abroad must be authenticated by a notary public; but if a foreign notary makes this rule an instrument of extortion to draw *British* property into an enemy's country, the court will dispense with the notarial certificate.

Ruding v. *Manning.* 3 W. P. T. 313

But it must be upon affidavit of the circumstances. *ib.*

FORGERY.

[*Page* 224.]

1. The counterfeit making of any part of a genuine note, which may give it a greater currency, is forgery;

Therefore, if a note be made payable at a country banker's, or at his banker's in *London*, who fails, it is forgery to alter the name of that *London* banker to the name of another *London* banker, with whom the maker makes his other notes payable after the failure of the first. *R.* v. *Treble* 3 W. P. T. 328

H.

HUNDRED.

[*Page* 243.]

5. In following up a writ of execution to its consummation under the statute of hue and cry 8 *G.* 2. *c.* 16. which the subsequent statute of the 19 *G.* 2. *c.* 34. refers to and adopts as the mode of proceeding in case of a penalty recovered by the executor of a revenue officer, killed in the pursuit of smugglers, against the inhabitants of the hundred, (or of a lath in *Kent.*) it is sufficient for the sheriff to whom the writ had been delivered to return, even after the expiration of 60 days given him by the act to return the writ, that he had delivered it to the justices of the peace of the hundred, &c. (who are charged with directing the levy on the inhabitants,) and that they had done nothing upon it; and the court will not thereupon attach the sheriff for not returning the writ, but the next proceeding is against the magistrates to oblige them to do their duty. *Wright & al.* v. *St. Augustine's lath, (Kent)* 13 E. R. 544

I. & J.

IMPRESSING SEAMEN.

[*Page* 243.]

8. A carpenter belonging to a vessel employed in the coal and croasting trade is not exempted from being impressed by any statute now in force.

Ex parte Boggin. 13 E. R. 549

INDICTMENT.

[*Page* 250. III.]

40. In an indictment for feloniously disposing and putting away counterfeit bank-notes, it is not necessary to aver *to whom* the note was so disposed of.

The intent to defraud the bank constitutes the offence, and it is not done away by the circumstance that the notes were furnished by the prisoner in consequence of an application made by an agent employed thereto by the bank, and that they were delivered to him as forged notes for the purpose of being disposed of by that agent.

R. v. *Holden & al.* 3 W. P. T. 334

41. The servant of three partners in trade had weekly wages, and three rooms assigned to him for lodging, over the bank and brewery office of the partners, with which it communicated by a trap-door and a ladder; a burglary being committed in the banking-room, it was held that it was well laid to be in the dwelling-house of the three partners.

R. v. *Stock & al.* 3 W. P. T. 339

INFERIOR COURT.

[*Page* 254.]

27. After action laid in *London*, and brought in B. R. for board and lodging of defendant's wife in *Middlesex*, which was referred to an arbitrator, who awarded less than 5*l.* for the *rent* of the lodging; this was held to come within § 13. of the 39, 40. *G.* 3. *c.* 104, excepting actions for rent from the compulsory jurisdiction of the *London* courts of request.

Holden v. *Newman.* 13 E. R. 161

INFORMATION.

[*Page* 255.]

14. A criminal information may be moved for against magistrates, for misconduct in the execution of their offices, in the second term after the offence committed, there being no intervening assizes.

R. v. *T. Harris & al.* 13 E. R. 270

15. But the court will not grant a rule *nisi* for a criminal information against a magistrate so late in the second term after the imputed offence, as to preclude him from the opportunity of shewing cause against it in the same term. *R.* v. *Marshall & al.* 13 E. R. 322

INSURANCE.

[*Page* 262. II.]

12. After an order made by the king in council on the 2d, and gazetted on the 5th Sept., to detain and bring into port all *Danish* vessels, *a hired armed ship of his Majesty* took off *Lisbon*, on the 10th, and carried in thither a *Danish* vessel; and without instituting any proceeding in the admiralty court there, though *Portugal* was an ally with *England* in the war, sold her cargo to defray the expense of repair, and took in a loading on freight for *London*, with which she sailed on Nov. 3, on which day hostilities were declared against *Denmark* by another order of council: and on Nov. 12, an insurance was made by order of the prize agent appointed by the captors, in consequence of a letter written by him in October, before the declaration of hostilities, directing the plaintiff to insure "*for my account* the *Danish* vessel *K. T.*, *which has been detained by his Majesty's armed ship B., and for which I am authorised to act as agent*;" and concluding with expressing the agent's confidence that the plaintiff would do the best *for the interest of the concerned:* and after such insurance was effected, the king, by another order of council, reciting the circumstances, adopted the insurance. Held that his Majesty, having a lawful possession of the captured vessel through the act of his officers and servants, whose possession was legalized by the previous order to detain *Danish* vessels, whether known to them or not at the time of the capture had an insurable interest therein; and that it was competent for him to adopt the insurance made by order of the agent appointed by the captors.

Routh v. *Thompson.* 13 E. R. 274

[*Page* 272. VII.]

16. An *American*, properly licensed to export saltpetre from *Calcutta* to *America*, having insured it for the voyage, the ship was seized by the captain of a *British* ship of war at the *Cape of Good Hope*, and the cargo condemned, unshipped, and sold by order of the court of Amiralty there, whose sentence was afterwards reversed on appeal here, and the property ordered to be restored, or its value paid to the owner, though upon payment of the captor's costs. The Court of K. B. held, that the assured might recover as for a total loss, without notice of abandonment; the thing insured being wholly lost to the owner by the unshipping and sale of the commodity at the *Cape*, under the order of the Court there: and that such loss was recoverable against the underwriters, on a count alleging it to have happened by the *unlawful seizure and detention of* a British ship of war: and that the Court of Appeal allowing the captor his costs, on the reversal of the sentence of condemnation, did not the less shew the original seizure and detention to be *unlawful*, as alleged in the count.

Mullett & al. v. *Shedden*. 13 E. R. 304

17. A vessel chartered to *Oporto*, *St. Ubes*, and *Gottenburgh*, being taken at *Oporto* by the enemy, was liberated on payment by the master of a sum of money, and on condition of his bringing home in her to *England English* prisoners, to be exchanged for an equal number of *French*. Upon the news of the capture, but after the time of the ship's liberation, the owners abandoned the ship to the insurers. Upon her arrival at *Portsmouth*, the captain refused to deliver her, unless on re-payment of the ransom, which the owner refused. The Court of C. P. held, that the owner being entitled to re take his ship which was safe at *Portsmouth*, the loss of the voyage did not enable him to recover upon a policy on the ship as for a total loss, nor could he recover, as for an average loss, the sum which had been paid by the master for the ship's ransom, and which, being an illegal payment, the plaintiff was not bound to repay to the master.

Parsons v. *Scott*. 8 W. P. T. 363

[*Page* 276. IX.]

39. *British* goods on board a neutral ship, being insured from *London* to any ports or places of discharge on the continent, &c. with liberty to carry simulated papers, &c. *free of capture or seizure in her port or ports of discharge*; and the ship having received instructions to proceed to the river *Jakde* with a supercargo, who, when arrived there, was to go to *Varel*, which lies 30 miles up the river, and there give notice to a correspondent of the ship's arrival, and receive directions where the goods might most safely be landed; *Varel* and the whole adjacent country being then occupied by the enemy; the Court of K. B. held, that a seizure by the enemy in boats from the shore, while the ship was lying on and off in the middle of the river, 15 miles up, where it is two miles wide, waiting for directions from the supercargo, who had gone up to *Varel* to get instructions where to land the cargo, was a seizure *in a port of discharge* within the exemption in the policy: for the intention of the contracting parties was plainly to exempt the underwriters for *land* risks in any such *sea port of discharge*, leaving them subject only to *sea* risks; and therefore the word *port* must be taken in its general and most extensive sense as contradistinguished from the *high seas*, with reference to the subject-matter. *Jannau & al.* v. *Coope*. 13 E. R. 594

40. The valuation upon a freight policy of insurance is calculated upon all the goods the ship is intended to carry upon the voyage insured; and if by a peril insured against the ship be lost, when part only of the goods, the freight of which was intended to be covered, was on board, the valuation must be opened, and the assured can only recover as for that proportional share.

But if there be a loss by a peril insured against, of the *whole* subject-matter of the insurance to which the valuation applied, as of *all* the *intended* freight, where the insurance is on freight, the valuation in the policy will not be opened.

And in an action on a freight policy, it seems sufficient to prove a contract under which the ship-owner would

have been entitled to demand freight, if the voyage were not stopped by a peril insured against.

Forbes v. *Aspinall.* 13 E. R. 323

41. A policy of insurance "*at*, and from *Lyme* to *London*" does not protect a cargo laden at *Bridport* within the port of *Lyme* and nine miles nearer to *London*. *Constable* v. *Noble.* 3 W. P. T. 403

42. If a policy be effected on goods on a voyage defined from *A.* to *B.*, the risk to commence "at and from the loading thereof on board," not saying where, it must be intended a loading at the place from which the voyage commenced. *Spitta and others* v. *Woodman.* 3 W. P. T. 416

And if the proof be, that the goods were loaded in an earlier part of the ship's course, and before her arrival at the place where the voyage insured commences, the plaintiff cannot recover. *ib.*

Though the same underwriter had insured the same goods for the anterior voyage, and knew the second policy was effected thereon. *ib.*

43. Liberty given in a policy on a fishing-voyage, to chase, capture, and man prizes, does not authorize the ship to lie by nine days off a port, waiting for an enemy's ship to come out when she should have completed her cargo. Although she lay in wait during that time within the limits of her fishing ground. *Hibbert & others* v. *Halliday.* 3 W. P. T. 428

44. Under a policy at and from Jamaica to London the Court of C. P. held that a ship was protected in moving from port to port in that island. *Cruickshanks* v. *Jamson.* 3 W. P. T. 301

[*Page* 278. XII.]

47. A native *Spaniard*, domiciled here in time of war, having been licensed in general terms by the king to ship goods in a neutral vessel from hence to certain ports of *Spain*, such commerce is legalized for all purposes of its due and effectual prosecution, either for the benefit of the party himself or of his correspondents, though residing in the enemy's country; and such goods may, therefore, be insured by him, either on his own account, or as agent for them; and he may sue and recover upon the policy in his own name in case of a loss by capture: and this, though the prize, which was taken by a *French* privateer, (*France* being a co-belligerent with *Spain*), was afterwards condemned by a *French* consular court then sitting in a port of *Spain*, into which the prize was carried; for in respect of the purposes of such licensed trading, the subjects of *Spain* concerned in it are to be regarded as *British* subjects.

Usparicha v. *Noble.* 13 E. R. 332

JURY AND JUROR.

[*Page* 290.]

8. In a writ of right, if the *nisi prius* clause be omitted in the writ of summons, and the knights come from a distant county, and appear at bar, the Court will not compel them to be sworn unless the demandant will undertake to pay their expenses.

Pearson v. *Maynard.* 1 W. P. T. 415

L.

LANDLORD AND TENANT.

[*Page* 297. II.]

26. A notice to quit at *Michaelmas* served *personally* on the tenant, who made no objection at the time, was held by the Court of K. B. to be primâ facie evidence from whence the jury may find that the tenancy commenced at that period. *Doe. d. Clarges, Bt.* v. *Forster.* 13 E. R. 405

LIBEL.

[*Page* 305. I.]

14. An action upon a libel charging in one count, that the defendant published it as purporting to be a letter from *A.* to *B.*; and in another, charging, generally, that the defendant published the libellous matter; is not sustained by proof of a publication wherein the defendant stated, that in a debate in the *Irish* House of Commons, several years before, the Attorney-General of *Ireland* had read such

a letter, and then stating the libellous matter *as said by him* in commenting upon that letter; for the characters of the several libels are essentially different, though the slander imputed may be the same. *Bell* v. *Byrne*. 13 E. R. 554

It seems, also, that a libellous assertion, that the plaintiff "*has been for some time past* confined on a charge of high treason," taken as a fact asserted generally by the publisher on his own knowledge, would refer to the period of the publication, and therefore would not be proved by shewing that it was asserted to have been said by another some years before, and consequently referring to the period when it was so said. *ib.*

[*Page* 306. III.]

10. Proof of a warrant to arrest *on suspicion of high treason* will not sustain a justification that the plaintiff was arrested and confined *on a charge of high treason.*

Bell v. *Byrne*. 13 E. R. 554

LIMITATION OF ACTIONS.

[*Page* 311.]

27. No debt accrues on a bill payable after sight until it is presented for payment; therefore the statute of Limitations is no bar to such a note unless it is presented for payment within six years before the action brought.

Holmes v. *Kerrison*. 3 W. P. T. 323

28. If an estate descend to parceners, one of whom is under a disability, which continues more than 20 years, and the other does not enter within 20 years, the disability of the one does not preserve the title of the other after the 20 years elapsed.

Doe d. Langdon & al. v. *Roulston*. 3 W. P. T. 441

And see title *East-India* Company page ix. of this Appendix.

M.

MANDAMUS.

[*Page* 320. I.]

31. The act of uniformity, 13 and 14 *Car.* 2. c. 4. § 19. having enacted that no person shall be allowed to preach as a lecturer, in any church, &c. "unless he be first approved and "thereunto licensed *by the Archbi-* "*shop of the province, or Bishop of* "*the diocese*," &c. the Court of K. B. will not entertain a motion for a mandamus to the Bishop to license a lecturer appointed by the parish upon the previous refusal of the Bishop to do so, upon the alleged ground of unfitness in the party elected, unless it be shewn that the like application had also been made to the Archbishop and rejected by him. *R.* v. *Bp. of London*. 13 E. R. 419

O.

OFFICE AND OFFICER.

[*Page* 328.]

29. A custom house officer has authority to seize uncustomed goods, with the carriage and horses carrying off the same, though out of the limit of the particular port of which he is denominated an officer in his deputation from the commissioners of customs.

R. v. *Barfoot*. 13 E. R. 506

P.

PARTNERS.

[*Page* 332.]

28. Part-owners of a ship having agreed "each and every of them with the others, and each or every of the others," that the ship should proceed on a certain voyage *under the exclusive management and controul of one of them as ship's husband*; and that after her return "*a full account should be made of the said ship and her concerns*," and the *net profits* be divided in proportion *after deducting all charges*; the duty of making out such an account is cast upon the ship's husband; and for not doing so, and not dividing the net profits, after deducting all

charges, within a reasonable time after the ship's return, an action lies against him, upon the agreement by each of the part-owners; though it be not averred in terms that the charges were or could have been ascertained before the action brought; for that is matter of defence. *Owston* v. *Ogle.* 13 E. R. 538

PAYMENT OF MONEY INTO COURT.

[*Page* 334.]

25. A Defendant was permitted to pay into court, to abide the event of the cause, a sufficient sum to cover the debt and costs, instead of giving bail. *Fowell* v. *Leo.* 2 N. R. 425

26. Rule refused to permit the defendant to pay into court the debt and costs up to a certain day after the action brought, (thereby excluding the costs of the declaration delivered), upon the ground of an order to pay the debt and costs up to that period, without having made a tender before action or obtaining the common rule for staying proceedings on payment of the debt and costs up to the time of the application. *Burmester* v. *Hilch.* 13 E. R. 551

27. In an action of covenant on an insurance against fire a tender may be pleaded and money paid into court under 19 *Geo.* 2. *c.* 37. § 7. *Solomon* v. *Bewicke.* 3 W. P. T. 317

PLEADING.

[*Page* 344. II.]

55. The defects of a declaration in an action for mesne profits, in not stating *any time* when the defendant broke and entered the messuage, &c. and ejected the plaintiff from the occupation of it; and in stating only that the defendant kept and continued the plaintiff so ejected *for a long space of time*, without stating for *how long*; are cured by the operation of the stat. 4 *Ann. c.* 16. after judgment by default and writ of inquiry of damages executed; so that no objection can be taken in arrest of final judgment for such defect in form. *Higgins* v. *Highfield.* 13 E. R. 407

56. In a count against the acceptor of a bill of exchange, stated to be *accepted payable at* S. *and Co.'s*, it is sufficient to allege *generally* a request by the plaintiff to the defendant to pay the bill, without alleging that it was

presented for payment *at the particular place.* *Fenton* v. *Goundry.* 13 E. R. 459

57. It is sufficient in a quitam action to entitle the plea with the names of the parties without the addition of quitam to the plaintiff's name. *Dale q. t.* v. *Beer.* 7 E. R. 338

[*Page* 354. XIII.]

6. A contract for the purchase of a certain parcel of hemp, the exact amount of which, not being known at the time, was described in the contract as *about* eight tons, may be declared on as a contract for eight tons, the certain quantity, which it was afterwards proved to be, which quantity was laid under a videlicet. *Gladstone* v. *Neale.* 13 E. R. 410

POOR SETTLEMENT.

[*Page* 370. I.]

23. An apprentice after serving out most of his time with his master in *S.* obtained a subsequent settlement in *H.* by serving another master there for 40 days by the direction of his first master, who was to receive 3*s.* a-week from the second master for such service; and being then dismissed by the second master, the apprentice, unknown to the first master, and without any intention of returning into his service again, lodged for one night in the same parish of *S.*, and then went into a third parish, and worked for himself for a month, when, his term being expired, he returned to *S.*, and went with his original master to a common friend, with whom the indenture had been deposited, to take it up; which he did, and carried it away: held, that the settlement was not brought back to *S.* by such *casual* lodging of the apprentice one night in the same parish of his master, without any resumption of, or even intention to resume, the service with the first master under the indenture. *R.* v. *Smarden (Inhab.)* 13 E. R. 452

PRACTICE.

[*Page* 403. XVII.]

8. Where the plaintiff recovers a greater sum than he claimed by his particular, and upon discussion the Court of C. P. sanctioned the principle on which he recovered, and judgment was enter

up accordingly, no objection having been made on the excess above the particular, either at the trial or on the argument, the court would not reduce the judgment to the sum claimed by the particular.

Bell v. *Puller & Another*. 3W.P.T.285

[*Page* 404. XX.]

10. A defendant has the same time to plead after a delivery of a bill of particulars as he had when the summons for it was returnable.

Mowbray v. *Schuberth*. 13 E. R. 508

[*Page* 411.]

42. A notice of trial for the sittings after term in *London* must specify whether the cause is intended to be tried at the first day of such sittings, or at the adjournment-day; and in the latter case, it is sufficient to give such notice eight days before the first day of the sittings after term, if the defendant reside above 40 miles from *London*; and four days if he reside within that distance.

Reg. Gen. E. 51 *G.* 3. 13 E. R. 393

PRISONER.

[*Page* 413. I.]

9. If a defendant in custody gives a cognovit it is absolutely necessary that the attorney for the defendant should be present. The clerk to the defendant's attorney is not sufficient.

Paul v. *Cleaver*. 3 W. P. T. 360

PRIZE AND PRIZE MONEY.

[*Page* 416.]

17. The commander of the *Cork* naval station on 3d of *May* ordered the *Loire* frigate, under his command, to cruize for a month within certain limits mentioned, (whether within the *Cork* station or not did not appear), but in case of obtaining intelligence of the enemy being at sea, to return immediately and report the same to to him, unless the captain should deem it more serviceable first to apprize the commander-in-chief of the *Channel* fleet off *Brest* of it, and then to return to *Cork* without loss of time. The *Loire* having sailed and obtained such intelligence on her cruize, went off *Brest*, and communicated it to the commander of the *Channel* fleet on the 25th of *May*, who on the 28th ordered the *Loire* to go off *Ferrol* with dispatches, &c.; and afterwards, and whilst in the execution of her former orders from the commander of the *Cork* station, to look out for the *Jamaica* homeward bound convoy within certain limits, (which were partly within and partly beyond his original cruizing orders;) and if met with, to protect them up *St. George's* and the *Bristol Channel*. The *Loire* having delivered the dispatches, &c. to the naval commander off *Ferrol*, on her return took three prizes, beyond, as was admitted, the limits of the *Channel* station, and asserted to be within the *Cork* station: (but whether or not within the *Cork* station was deemed to be immaterial in this case:) The Court of K. B. held, that the commander-in-chief of the *Channel* fleet did not, within the true meaning of his orders to the *Loire*, intend to retain her under his command after the execution of his orders off *Ferrol*, but only that she should attend to his further instructions while executing her original orders, and as a modification of, or addition to, such orders, rather than as a supercession or abrogation of them. But that, if he had so intended, he had no right so to retain her out of the limits of his command by partial modifications of her original orders, for the purpose of entitling himself to prizes taken by her out of such limits, in derogation of the rights of another flag-officer. *Gardner (Lady) & al.* v. *Lyne*. 13 E. R. 574

S.

SHIP.

[*Page* 442. I.]

29. The usual clause in a bill of lading, engaging the master of the ship to deliver the goods to the consignee or his assigns, *he or they paying freight for the said goods*, is introduced for the benefit of the master only, and not for the benefit of the consignee; and therefore the master is not bound to the consignor to withhold the delivery of the goods unless the consignee or his assigns pay the freight. Nor

does it vary the case that the consignor was also the charterer of the ship.
Shephard v. *De Bernales*. 13 E.R. 565

30. A ship was let to freight for the voyage, to take out a small cargo of lead to *P.* and to bring home a return cargo, for which freight was to be paid at 11 guineas a ton for the whole ship's admeasurement. If from political circumstances she should be unable to discharge her cargo, and consequently to obtain a return cargo, the freighters agreed to pay a gross sum, less than the amount of the freight per ton: the ship being prevented from discharging, and the freighter supplying no homeward cargo, the master took in goods on freight, and brought them home together with the lead: the court held that he was entitled to receive the gross sum stipulated, and also to retain the freight which the ship had earned.
Bell v. *Puller & al.* 3W. P.T. 285

31. The master of a ship having contracted by the bill of lading with the shippers to deliver goods to certain persons or their assigns, *he or they paying freight for the same;* the demanding and taking of such goods from the master by a purchaser and assignee of the bill of lading, without the freight having been paid, is evidence of a new contract and promise on the part of such purchaser, as the ultimate appointee of the shippers for the purpose of such delivery, to pay the freight; and he is liable for the amount in an action of *indebitatus assumpsit* brought against him by the ship-owner.
Cock v. *Taylor*. 13 E. R. 399

[*Page* 442. II.]

5. The master of a ship detained as prize, and libelled in the prize court at *Jamaica*, gave bills of lading of the cargo, to one who became bail for the ship and cargo there: held that the master had no authority to contract that the cargo should be sold in *London*, and the proceeds remitted back to *Jamaica*, the owners being ready to give a sufficient security to indemnify the bail in *London*.
Johnson v. *Greaves*. 3 W. P. T. 344

[*Page* 446. IV.]

17. Possession of a ship under a transfer void for non-compliance with register acts, is a sufficient title in trover against a stranger, for parts of the ship being wrecked.
Sutton v. *Buck*. 1 W. P. T. 302
Possession under a general bailment, is a sufficient title for a plaintiff in trover. 1 W. P. T. 302
The plaintiff bought and paid for a ship stranded on the *English* coast, but the transfer was not regular; he tried to save her, but she went to pieces; the defendant possessed himself of parts of the wreck, which drifted on his farm; the Court of C. P. held that the plaintiff's possession enabled him to recover for them in trover. 1 W. P. T. 302

18. If the owner of a ship, having chartered her for a voyage, assigns her before the voyage, though he afterwards assigns the charter-party to another, if she earns freight, the assignee of the ship is entitled to the freight, as incident to the ship.
Morrison v. *Parsons*. 3 W. P. T. 407
But he cannot sue on the charter-party otherwise than in the name of the assignor. 3 W. P. T. 407

[*Page* 447. V.]

3. The lord of a manor is not entitled to salvage for taking against the consent of the owner parts of a ship thrown on his manor when the servants of the owner are there to take care of it for him. *Sutton* v. *Buck*. 3W.P.T.300

T.

TRESPASS.

[*Page* 471. II.]

32. To an action of trespass against the Speaker of the House of Commons for forcibly, and with the assistance of armed soldiers, breaking into the messuage of the plaintiff (the outer door being shut and fastened), and arresting him there, and taking him to the Tower of London, and imprisoning him there; it is a legal justification and bar to plead that a Parliament was held, which was sitting during the period of the trespasses complained of;

that the plaintiff was a Member of the House of Commons; and that the House having resolved, "That a certain letter, &c. in Cobbett's Weekly Register, was a libellous and scandalous paper, reflecting on the just rights and privileges of the House, and that the plaintiff, who had admitted that the said letter, &c. was printed by his authority, had been thereby guilty of a breach of the privileges of that House;" and having ordered, that for his said offence he should be committed to the Tower, and that the Speaker should issue his warrant accordingly; the defendant, as Speaker, in execution of the said order, issued his warrant to the Serjeant at Arms, to whom the execution of the said warrant belonged, to arrest the plaintiff, and commit him to the custody of the Lieutenant of the Tower; and issued another warrant to the Lieutenant of the Tower to receive and detain the plaintiff in custody, during the pleasure of the House; by virtue of which first warrant the Serjeant at Arms went to the messuage of the plaintiff, where he then was, to execute it; and because the outer door was fastened, and he could not enter, after audible notification of his purpose, and demand made of admission, he, by the assistance of the said soldiers, broke and entered the plaintiff's messuage, and arrested and conveyed him to the Tower, where he was received and detained in custody, under the other warrant, by the Lieutenant of the Tower. *Burdett (Bart.)* v. *Right Honourable Charles Abbot.* 14 E. R. 1

33. The Serjeant at Arms of the House of Commons being charged with the execution of the Speaker's warrant for arresting and conveying to the Tower, the plaintiff a Member of the House, for a breach of privilege, is not guilty of any excess of authority in the execution of such warrant, so as to make him a trespasser *ab initio*, if, upon the refusal of the plaintiff to submit to the arrest, and his shutting his outer door against the Serjeant, who had demanded admission for the purpose, and declaring that the warrant was illegal, and that he would only submit to superior force; and a large mob having assembled before the plaintiff's house, and in the streets adjoining; so that the Serjeant could not arrest and convey the plaintiff to the Tower, without danger to himself and his ordinary assistants, if at all by the mere aid of the civil power; the Serjeant thereupon call in aid a large military force; and after breaking into the plaintiff's house, plant a competent number of the military therein for the purpose of securing a safe and convenient passage to conduct the plaintiff out of the house into a carriage in waiting, and from thence conduct him with a large military escort to the Tower, using at the same time every personal curtesy to his prisoner consistent with the due execution of his duty; which however will not admit of delay, (breeding hazard), in the execution of such warrant.
Burdett (Bart.) v. *Colman.* 14 E. R. 163

34. Evidence of acts of violence of the mob, committed in parts adjacent, though out of view and hearing of the plaintiff in his house, appearing to be connected with the same purpose, as actuated those about the plaintiff's house, admitted to shew the danger and difficulty of executing the warrant by force against the plaintiff in his own house, without the aid and protection of the military. 14 E. R. 183

V.

VARIANCE.

[*Page* 479. I.]

44. In action for maliciously, &c. arresting and holding the plaintiff to *bail*, in which the declaration in setting out the judgment by default in the former action stated, that "it was thereupon considered that the then plaintiffs should take nothing by their said writ, but that they *and their pledges to prosecute* should be in mercy, &c.;" it is no material variance if the record produced in evidence have not the words "*and their pledges to prosecute*," but only have an "&c.;" for these words may be rejected as surplusage, the substance of the allegation being the discontinuance of the former suit.
Judge v. *Morgan.* 13 E. R. 547

VENDOR AND VENDEE.

[*Page* 481.]

Where a sale-note for the purchase of 50 tons of *Greenland* oil was delivered by the seller's broker to the purchasers to be paid for by their acceptance payable at a future day; and they afterwards received from the sellers an order on their wharfingers for the delivery of the 50 out of 90 tons of their oil; yet as the custom of the trade was for the casks to be searched by the seller's cooper, and for a broker on behalf of both parties to ascertain the foot-dirt and water in each, for which allowance was to be made), and then the casks were to be filled up by the seller's cooper, at their expense; all which was to precede the delivery to the buyers: held that the sale was not complete to pass the property; but that the sellers on the insolvency and subsequent bankruptcy of the buyers before such acts done and delivery made might countermand it. *Wallace & al. Assignees* v. *Breeds.* 13 E. R. 522

W.

WAGER.

[*Page* 490.]

21. A stake-holder receiving country bank notes as money, and paying them over wrongfully to the original staker after he had lost the wager is answerable to the winner in an action for money had and received.

Pickard v. *Bankes.* 13 E. R. 20

WARRANTY.

[*Page* 491.]

10. In an action on a warranty of a horse the plaintiff must positively prove that the horse was unsound.

Eaves v. *Dixon.* 3 W. P. T. 334